88-122

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY LINE JOINT VENTURE,

Petitioner,

v.

CITY OF GRAND PRAIRIE, TEXAS,

Respondent.

On Petition For Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR CERTIORARI

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July 18, 1988

QUESTIONS PRESENTED

1. Is a property owner entitled to procedural due process — notice and a hearing — prior to termination of the owner's specific use permit?

2. Is a property owner entitled to a reasonable post-deprivation hearing following termination of the owner's specific use permit if the termination occurred without notice to the property owner or opportunity for a hearing?

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On Petition For Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR CERTIORARI

OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Fifth Circuit which is reported at 839 F.2d 1042 and reprinted as Appendix D (13a).[1] The Order of the United States District Court for the Northern District of Texas, Dallas Division (Porter, J.), denying Petitioner's Motion for Partial Summary Judgment and granting Respondent's Motion

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[1] References to the appendices will be styled, e.g., "App. A"; to particular pages therein, "10a"; to portions of the district court record, "R., Vol. I at 10". The appendices are bound in a separate volume.

for Summary Judgment is reprinted as App. C (6a). The initial Order of the United States District Court for the Northern District of Texas, Dallas Division (Buchmeyer, J. sitting for Porter, J.), granting Petitioner's Motion for Partial Summary Judgment is reprinted as App. A (1a). The Order of the Fifth Circuit denying Petitioner's Request for Rehearing and Suggestion for Rehearing *en banc* is reprinted as App. E (24a).

JURISDICTION

The decision and judgment of the Court of Appeals was entered on March 18, 1988. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on April 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

A. Constitutional Provisions.

The Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment:

> " . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . ."

B. Ordinances.

City of Grand Prairie Ordinance No. 2750[2]

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[2] The full text of Ordinance No. 2750 is set out in App. F (26a).

"An ordinance . . . amended so as to establish a specific use permit . . . for the purpose of on site use of alcoholic beverages . . ."

City of Grand Prairie Ordinance No. 3745[3]

"An ordinance . . . related to termination of specific use permits, . . .

A. All specific use permits approved in accordance with with the provisions of this ordinance in its original form or as hereafter amended shall automatically terminate upon cessation of the use for a period of six months, regardless of the intention of the owner.

. . . ."

STATEMENT OF THE CASE

This case involves an ordinance that automatically terminates property rights regardless of the intention of the owner but provides no provision for notice and hearing prior to the termination and no post-deprivation procedure to allow a review of the termination.

Petitioner, County Line Joint Venture,[4] filed suit against Respondent, City of Grand Prairie, Texas,[5] seeking to have Ordinance No. 3745 declared unconstitutional because, *inter alia*, it, in conjunction with the Respondent's lack of a proper procedural

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[3] The full text of Ordinance No. 3745 is set out in App. G (32a).

[4] County Line Joint Venture, Plaintiff and Appellant below, will hereinafter simply be referred to as "Petitioner."

[5] City of Grand Prairie, Texas, Defendant and Appellee below, will hereinafter simply be referred to as "Respondent."

mechanism, denies property owners due process of law.[6] Petitioner moved the district court for a motion for partial summary judgment. (R., Vol. I at 32-86). Respondent moved the district court for a summary judgment. (R., Vol. I at 153 through Vol. II at 330). The district court initially granted Petitioner's motion for partial summary judgment on November 20, 1986 (1a).

The initial district court order granting Petitioner's motion for partial summary judgment on the due process issue found that "[n]either Plaintiff nor his lessee was given a hearing with respect to the termination of the specific use permit", (1a), and that "Plaintiff's use of his land to sell alcoholic beverages for on-premises consumption is a significant property interest, protected by the due process clause of the United States Constitution." (2a). The district court then concluded that "Defendant deprived Plaintiff of his property without due process of law" (2a).

On November 21, 1986, the district court vacated its summary judgment in favor of Petitioner "because it was prematurely entered" (5a). Thereafter, the Respondent filed its motion and brief for summary judgment. (R., Vol. I at 153 through Vol. II at 330).[7] On March 18, 1987, Judge Porter entered an order denying Petitioner's motion for partial summary judgment and granting Respondent's motion for summary judgment and dismissing the

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[6] Petitioner raised numerous grounds for challenging the constitutionality and legality of Ordinance No. 3745 and the Respondent's actions against Petitioner. The Fifth Circuit remanded the case for further consideration of the other federal claims and state claims, but affirmed the district court's grant of summary judgment for the Respondent on the procedural due process issue (23a).

[7] Respondent's motion and brief in support of Respondent's motion for summary judgment and response to Petitioner's motion for partial summary judgment did not raise any contest to the undisputed facts that Petitioner was not given notice or a hearing prior to the termination and that Petitioner's specific use permit was a significant property interest protectable by the due process clause of the United States Constitution.

remainder of the claims (6a). The district court's order made a glaring factual omission and misconception. The district court failed to understand that Petitioner had a perpetual *pre-existing* specific use permit and that the permit had been terminated. The district court erroneously determined in its opinion and order that Petitioner was applying for a new specific use permit and that the Respondent's actions were a denial of an application as opposed to a termination of an existing property right. The district court dismissed Petitioner's remaining federal claims and pendent state claims (12a). Petitioner timely appealed Judge Porter's order of March 18, 1987.

On March 18, 1988, a panel of the Fifth Circuit Court of Appeals affirmed the district court's grant of a summary judgment for Respondent on the procedural due process issue and remanded the case for further consideration of the other federal claims and state claims pending (23a). The appellate court viewed the Respondent's termination of Petitioner's property interest as a legislative act and, thus, determined that Petitioner had no due process rights (16a — 17a, 20a).

Petitioner is the owner of property located at 2515-H W. Jefferson in Grand Prairie, Texas. The property has been used for a number of years as a night club. (R., Vol. I at 139). On August 31, 1976, Respondent granted Petitioner a specific use permit enabling the sale of alcoholic beverages at the property. On November 27, 1985, Petitioner's tenant applied to Respondent for (i) an alcoholic beverage license; (ii) a dance hall license; and, (iii) a mechanical amusement device license. (R., Vol. I at 140). On December 2, 1985, Respondent, by and through the City Secretary, denied all three applications. (R., Vol. I at 141). The Secretary denied the applications because she determined that Petitioner's specific use permit had terminated.[8]

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[8] See, n. 16 through 18, *infra*.

Prior to December 2, 1985, Petitioner had not been notified that Respondent had determined to terminate Petitioner's specific use permit. Petitioner was not given notice or a hearing prior to the termination of its property right.

Subsequent to Respondent's termination of the specific use permit, Petitioner attempted to appeal the City Secretary's decision administratively. (R., Vol. I at 142).[9] Respondent refused to hear Petitioner's appeal. (R., Vol. I at 143) (46a). Apparently, Respondent does not have a procedural mechanism to appeal the City Secretary's determination that a property owner's specific use permit is terminated.

Respondent admitted in the district court and Court of Appeals that (i) Petitioner's specific use permit is a significant property interest, (ii) that Petitioner received no notice and no hearing prior to the termination of the specific use permit, and (iii) that Respondent refused to hear Petitioner's appeal. Petitioner seeks review of the Court of Appeals' decision affirming the district court's dismissal of Petitioner's procedural due process rights. The Fifth Circuit found that the Respondent's actions were legislative rather than adjudicative in nature and refused to afford Petitioner its procedural due process rights. Petitioner believes that the case-specific decision of the city secretary should not be afforded legislative deference and that Petitioner has procedural due process rights which have been violated.

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[9] The full text of Petitioner's administrative appeal is contained in App. H (35a).

REASONS FOR GRANTING THE WRIT

I. Significant Conflict of Decisions Among The Circuits.

The Fifth Circuit's decision denying procedural due process rights to Petitioner and affirming the decision of Respondent's city secretary terminating Petitioner's specific use permit directly conflicts with a decision of the Ninth Circuit Court of Appeals. In *Kerley Industries, Inc. v. Pima County*, 785 F.2d 1444 (9th Cir. 1986), the Ninth Circuit found that Kerley's conditional operating permit could not be revoked without giving Kerley a hearing and opportunity to prove the zoning inspector wrong. Kerley had obtained a conditional operating permit that would enable it to manufacture a specific chemical.[10] The court, relying upon this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972), determined that the conditional operating permit[11] was a significant property right triggering the constitutional requirement of due process. The Court said:

> Having granted appellant a permit to operate its plant, the County could not take it away arbitrarily, *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973, . . . (1982), for improper reasons, or without appropriate procedural safeguards. *Roth*, 408 U.S. . . . .

785 F.2d at 1446.

It is undisputed in this case that the City granted Petitioner a perpetual specific use permit in August, 1976[12] and that the property had been used for the sale of alcoholic beverages for

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[10] Kerley's plant never manufactured the chemical.

[11] Unlike the specific use permit in the case at bar, the conditional permit was only for 30 days. Petitioner's specific use permit had been in effect for over ten years prior to its wrongful termination and was perpetual.

[12] Ord. No. 2750 (App. F at 26a).

many years.[13] Because Petitioner's property right is perpetual and not "conditional," there is even more reason to find that it is a significant property right which endows Petitioner with a sufficient claim of entitlement to trigger the constitutional requirement of due process. The Fifth Circuit failed to address the property interest involved. Instead, the Court erroneously concluded that Respondent's actions should be viewed as legislative in nature and, thus, Petitioner had no procedural due process rights. By concluding that the conduct of Respondent and its secretary were legislative acts, the Fifth Circuit disposed of Petitioner's constitutional rights with haste.

II. Significant Property Interests Are Entitled To Procedural Due Process Protection.

This Court has stated that:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of *prior* hearing is paramount.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71 (1972) (emphasis added).[14] Petitioner has a legitimate claim of entitlement and expectation that its specific use permit will not be terminated unless Petitioner is afforded procedural due process.

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[13] (R., Vol. I at 139).

[14] In the *Roth* decision, this Court elaborated on the requirements of procedural due process by stating that "It is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate [a protected] interest . . ., it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." *Roth*, at 408 U.S. at 571 n.7 (*quoting Bell v. Burson*, 402 U.S. 535, 542 (1971)).

The specific property right in question was granted, by ordinance, to Petitioner in August, 1976.[15] Petitioner has used the property consistent with the grant of the specific use permit since 1976 and up until the termination of the specific use permit in December, 1985. Petitioner has never abandoned the specific use permit nor has Petitioner ever used the property inconsistent with the specific use permit. In fact, even prior to the specific ordinance giving Petitioner a specific use permit, Petitioner had used the property for the same purposes, i.e., the sale of alcoholic beverages.

Federal courts have recognized that property rights, giving the property owners a legitimate claim of entitlement to due process protection, have arisen in many circumstances. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, _____ U.S. _____, 107 S. Ct. 2378 (1987) (ordinance temporarily denying landowner all the use of his land may be considered a taking of property); *McCulloch v. Glasgow*, 620 F.2d 47, 50 (5th Cir. 1980) (conflict between plaintiffs' arguable unencumbered title and town's arguable easement sufficient to create a significant property interest entitling plaintiffs to due process hearing); *Richland Park Homeowners Ass'n, Inc. v. Pierce*, 671 F.2d 935, 944 n.7 (5th Cir. 1982) (any diminution in the owner's rights of use in his property will fall with the purview of the due process clause); and, *Evers v. County of Custer*, 745 F.2d 1196, 1201-1202 (9th Cir. 1984) (total taking of property not necessarily required — deprivation of property interest may occur when a property owner's right to exclude others is prevented).

The right to use one's property in the same manner that the property has been used for in excess of 25 years is, without doubt, a significant property interest. The significance of the property interest is underscored by the specific granting of that right by municipal ordinance. The Respondent did not contend in either

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[15] App. F (26a).

the district court or Fifth Circuit that Petitioner's specific use permit was anything other than a significant property interest. The Fifth Circuit never reached the question of Petitioner's property right because it erroneously jumped onto the bandwagon of construing Petitioner's actions under the legislative model.

III. The Fifth Circuit Misconstrued the Actions of the City Secretary and Cloaked Them With the Legislative Model Shield.

The Fifth Circuit's analysis of the City Secretary's role is erroneous. In the decision, the only statements made by the Fifth Circuit concerning the actions of the City Secretary were:

> County Line's alternative argument — that the action by the city secretary deprived it of procedural due process — lacks any merit. The city secretary possessed no power to make zoning decisions. Thus, her decision had no effect on the existence or non-existence of the SUP. Indeed, the city secretary's decision could very well have been wrong.

Fifth Circuit decision at 20a.

This analysis of the City Secretary's role in terminating Petitioner's specific use permit is in stark contrast to the uncontested summary judgment evidence presented by Petitioner based upon the testimony of Respondent's employees. In response to questions from counsel for Petitioner, the City Secretary gave the following deposition testimony:

> Q: Did you reach the conclusion that the Specific Use Permit 212 had been terminated in accordance with Article 3745 [Section B-713] prior to your conversation with the City Attorney?
>
> A: Yes.

Q: And was that the reason you denied Mr. Gomez' applications for an alcoholic beverage license?

A: Yes.[16]

Q: (By Mr. Bundren) Was there any reason for your denial of Mr. Gomez' application for an alcoholic beverage license, *other than your determination* that the SUP 212 had been terminated in accordance with Section A of Ordinance 3745 [Section B-713]?

A: I'm sorry, I didn't — I don't remember.

Mr. Bundren: Let him read it back.

(Reporter read back question.)

The Witness: No.[17]

Q: But you denied the licenses of Mr. Gomez because *you determinated* that the Specific Use Permit 212 had been terminated, is that correct?

A: Yes.

Q: And that was your reason for denying his application for licenses?

A: Yes.

Q: And that was the only reason you denied it?

A: Yes.[18]

This interpretation of the action of Sue Shawver was confirmed by Steven Stackhouse, the Zoning and Subdivision Administrator

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[16] Dep. Sue Shawver at 101.

[17] Dep. Sue Shawver at pp. 102-103 (emphasis added).

[18] Dep. Sue Shawver at 120 (emphasis added).

for the City of Grand Prairie, who, in response to questions by Petitioner's counsel gave the following deposition testimony:

> Q: Do you know who was involved or who informed Mr. Gomez that this Specific Use Permit had terminated?
>
> A: I believe that was determined when he had made application for either a continuance, extension or considered it a new application, if you will, of his alcoholic beverage commission's license to operate at that location. That is handled through the City Secretary's office. And it was, I'm sure, conveyed to Mr. Gomez at that time that, you know, that they *could not release such a license because his Specific Use Permit had ceased to exist.*[19]

The testimony of the City Secretary, and the confirmation of that testimony by Steven Stackhouse, the Zoning and Subdivision Administrator for Respondent, confirms that Petitioner's specific use permit was terminated or "ceased to exist." The Fifth Circuit nevertheless refused to consider the acts of the secretary because she may "have been wrong." The Fifth Circuit implies that Petitioner's specific use permit may not be terminated at this time; however, such implication is directly in conflict with the testimony of the City Secretary and the City's Zoning and Subdivision Administrator. The clear and convincing evidence is that Respondent treats Petitioner's specific use permit as having terminated or "ceased to exist." If the specific use permit has been terminated, as Respondent's witnesses unequivocally testify to, the termination undisputably occurred without notice or opportunity for a hearing to Petitioner. The Fifth Circuit refused to follow even Respondent's own evidence and, consequently, reached an erroneous conclusion.

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[19] Dep. Steven Stackhouse at pp. 80-81 (emphasis added).

IV. Future Significance of this Issue.

The Fifth Circuit's opinion cloaks the City Secretary of Respondent with the deference normally afforded to legislative bodies when dealing with general laws affecting large numbers of individuals. In this case, the Fifth Circuit has, for the first time, given legislative deference to a decision of an employee reviewing and determining specific facts on a single application. The City Secretary's decision that Petitioner's specific use permit was terminated and, consequently, that Petitioner's tenant was not entitled to any license was not a legislative decision; it was, and is, clearly an adjudicative act. It reviewed a specific case, not a general application; it adjudged specific facts to a law (Ordinance 3745); it was not made by a legislative body, but by a single individual; and, it made a specific final ruling with respect to Petitioner's property. The practical and precedential effect of the Fifth Circuit ruling is to greatly expand those types of decisions that will be shielded by legislative deference. The precedent is dangerous to all citizens wishing to retain their property interest and significantly conflicts with prior procedural due process decisions of this Court and the other circuits.

If this decision of the Fifth Circuit is not reversed, the ability of owners to expect and receive, at the very minimum, notice and a hearing prior to the termination of their property rights will be seriously jeopardized. This decision has significance for all property owners who are presently having their property rights trampled upon by local municipalities without concern for procedural due process.

CONCLUSION

Petitioner has a significant property interest in its specific use permit giving rise to the procedural due process protection of notice and hearing. Respondent terminated Petitioner's specific use permit without notice and prior to any hearing. Petitioner

attempted to appeal the decision. Respondent's ordinances do not afford Petitioner a method to appeal the decision to terminate a specific use permit. Petitioner was entitled to notice and an opportunity to be heard prior to the termination of Petitioner's specific use permit. At the least, Petitioner was entitled to a reasonably timely post-deprivation hearing of the City Secretary's decision. Respondent violated Petitioner's procedural due process rights.

For all of these reasons, a writ of certiorari should be granted and this case should be set for argument.

Respectfully submitted,
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By: /s/ WM. CHARLES BUNDREN
Wm. Charles Bundren

Attorneys For Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing has been mailed, by Certified Mail, Return Receipt Requested, to counsel for Respondent, George A. Staples, Jr., Esq., Staples, Foster & Hampton, 701 Texas Commerce Bank Bldg., 860 Airport Freeway West, Hurst, Texas, 76054, on this 18th day of July, 1988.

/s/ WM. CHARLES BUNDREN
Wm. Charles Bundren

88-122

No. 88-

IN THE

Supreme Court of the United States

_____ TERM, 1988

COUNTY LINE JOINT VENTURE,
Petitioner,

v.

CITY OF GRAND PRAIRIE, TEXAS,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI

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July 18, 1988

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COUNTY LINE JOINT VENTURE
vs.
CITY OF GRAND PRAIRIE, TEXAS
} No. CA3-86-1919-F

ORDER

Before the Court comes Plaintiff's Motion for Partial Summary Judgment. The motion is granted.

I. FACTS

Plaintiff owns a nightclub in Grand Prairie on land that the city had zoned "commercial — office." On August 31, 1976, an ordinance granting a specific use permit to sell alcoholic beverages on this land was passed and approved. The property has been used as a nightclub for about 10 years. On November 17, 1985, Plaintiff's lessee applied to the Defendant for an alcoholic beverage license. The application was denied by the City Secretary of Grand Prairie under the Defendant's Comprehensive Zoning Ordinance, Section B-713.

Plaintiff and Plaintiff's lessee thereafter appealed to the Zoning Board of Adjustments and Appeals for the City of Grand Prairie. This Board refused to hear the appeal, and gave no reason therefor.

Neither Plaintiff nor his lessee was given a hearing with respect to the termination of the specific use permit. The Defendant did not send written notice of the hearing in which the zoning change was made to any of the owners of property over which a specific use permit had been previously granted by Defendant.

II. DUE PROCESS

Plaintiff's use of his land to sell alcoholic beverages for on-premises consumption is a significant property interest, protectable by the due process clause of the United States Constitution. *See McCulloch v. Glasgow,* 620 F.2d 47, 50 (5th Cir. 1980). When there is a protected property interest, then the right to a hearing is paramount. *Board of Regents v. Roth,* 408 U.S. 564, 569-570 (1972). In *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), the Supreme Court announced three factors to determine whether a state procedure satisfies due process.

1. The private interest that will be affected by the official action;

2. the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

3. the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Here, Plaintiff has a strong interest in seeing that it can sell alcoholic beverages on its property. Second, the Defendant, by relying on its City Secretary to determine whether the land can be used to sell alcoholic beverages and providing no hearings and no appeals ran a great risk of erroneously depriving Plaintiff of his property interest. Lastly, the government would suffer no undue fiscal or administrative burdens by enabling Plaintiff to appeal the determination to the City Secretary to the Zoning Board since that is what the Zoning Board is for.

Therefore, the Court finds that the Defendant deprived Plaintiff of his property without due process of law.

III. CONSTITUTIONALITY OF ORDINANCES

Plaintiff next argues that the disputed ordinances violate the Texas Constitution. The Court has decided that such ordinances do violate the Texas Constitution.

Article XI, Section 5 of the Texas Constitution provides in part that:

> [N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State .... Tex. Const. art. XI, § 5.

All the disputed ordinances directly conflict with the Texas Alcoholic Beverage Code ("TABC"), because they in one way or another restrict the sale of alcohol in a way that is reserved to the TABC. *See* TABC §§ 1.06, 109.31, 109.32(a)(1) (Vernon 1978). The ordinances therefore violate the Texas Constitution. *See Royer v. Ritter,* 531 S.W.2d 448, 449 (Tex. Civ. App. — Beaumont 1975, writ ref'd n.r.e.).

IV. INVALIDITY OF ORDINANCES

Lastly, Defendant failed to provide Plaintiff with requisite statutory notice for a public hearing concerning ordinances No. 3745 and 3754. These ordinances effectively added the ordinances B-711, B-710, and B-713 to the Comprehensive Zoning Ordinance of Defendant.

Written notice to property owners affected by a zoning change is required. Tex. Rev. Civ. Stat. Ann. art. 1011f (Vernon 1963). With neither ordinance 3754 nor 3745 was written notice provided. Notice by publication is also required for zoning changes. *Id.* Again, with neither ordinance 3754 nor 3745 was proper publication notice given. With the former, nothing was published

at all. With the latter, 10 days notice was given, but 15 days notice is required. Therefore, no proper notice was given.

The Texas Supreme Court held that the Courts of this state have held ordinances and amendments to ordinances invalid where the express, mandatory provisions of the zoning statute have not been complied with. The steps directed to be taken for notice and hearing, when provided for in the law, are intended for the protection of the property owner, and are his safeguards against the exercise of arbitrary power. Each act required is essential to the exercise of jurisdiction by the City Council, and each must be rigidly performed. *Bolton v. Sparks,* 362 S.W.2d 946, 950 (Tex. 1962).

Therefore, the Court holds that the two ordinances, No. 3754 and 3745 are invalid.

So ORDERED this 20th day of November, 1986.

/s/ JERRY BUCHMEYER
for ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COUNTY LINE JOINT VENTURE
v.
CITY OF GRAND PRAIRIE, TEXAS
} No. CA3-86-1919-F

ORDER

The Court's Order granting partial summary judgment for Plaintiff is hereby vacated, because it was prematurely entered.

So ORDERED this 21st day of November, 1986.

/s/ JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COUNTY LINE JOINT VENTURE
vs.
CITY OF GRAND PRAIRIE, TEXAS
No. CA3-86-1919-F

ORDER

Before the Court come cross motions for summary judgment. The Court hereby denies Plaintiff's motion and grants Defendant's motion.

This dispute arises from a change in zoning ordinances.

Plaintiff seeks basically three things. First, Plaintiff wants a judgment declaring that the lack of any procedural mechanism to appeal or otherwise challenge the decision of the city secretary constitutes a denial of Plaintiff's procedural due process rights. Second, he wants a judgment declaring the ordinances unconstitutional under the Texas Constitution. Third, he wants an injunction enjoining the City from enforcing its ordinances. Plaintiff claims a denial of substantive due process (Complaint ¶ 5.5) but does not raise this in his motion for summary judgment. The questions of whether Defendant's ordinances are unconstitutional or invalid are not federal questions; these are questions of state law and the Court has pendent jurisdiction over them. *United Mine Workers v. Gibbs* 383 U.S. 715, 726 (1966).

Summary judgment is appropriate when there is no issue of material fact and it is clear that the movant is entitled to judgment as a matter of law. See Rule 56(c); *Joe Reguiera, Inc. v. American Distilling Co., Inc.*, 642 F.2d 826, 829 (5th Cir. 1981). When a motion for summary judgment is made and

supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, *shall* be entered against him. Rule 56(e) (emphasis added).

The Court first considers Plaintiff's motion for summary judgment and first considers Plaintiff's claim that Defendant under color of law deprived Plaintiff of his procedural due process rights.

It is not clear whether a Plaintiff can state a claim for the violation of his procedural due process rights in the context of a zoning case at all. Traditionally, zoning decisions were considered legislative and therefore no Plaintiff could complain of procedural due process violations. The Fifth Circuit has said that "Our opinions repeatedly characterize local zoning decisions as 'legislative' in nature. If this word is used advisedly — as it appears to be — then the plaintiffs cannot complain of a denial of procedural due process, for no constitutional limitation on legislative procedure is relevant here. Most of the cases developing procedural limitations on government action involve challenges to administrative decisions. The plaintiffs do not cite a single federal case that even discusses procedural requirements for zoning matters, let alone one that reverses a zoning decision because of a procedural failure." *Couf v. DeBlaker,* 652 F.2d 585, 590 (5th Cir. 1981). The Fifth Circuit held that "The *only* question which federal district courts may consider is whether the action of the zoning commission is arbitrary and capricious, having no substantial relation to the general welfare." *South Gwinnett Venture v. Pruitt,* 491 F.2d 5, 7 (1974) (en banc) (emphasis added). The Court stated that such a procedural due process claim was rightfully dismissed at the district court level. *Id.*

Whether this is still the rule is uncertain. The Fifth Circuit held in another zoning case that "Even when the deprivation of a

property right triggers procedural due process standards that may require a state agency to be able to point to a rational basis employed in reaching its decision, as opposed to a basis later hypothesized by others, nothing requires proof of *the,* as distinguished from *a,* basis of decision." *Shelton v. City of College Station,* 780 F.2d 475, 484 (5th Cir. 1986) (en banc). However, the same decision holds that "whatever be the role of procedural due process here, we are persuaded, as were the district court and the panel, that [a board member's] mere membership in a church that also opposed the grant of the variances does not by itself establish bias . . . ." *Id.* at 485-486. The dissent reads the majority as having admitted that procedural due process scrutiny might properly apply to a Zoning Board's decision. *Id.* at 488.

The only similar cases to handle this issue after *Shelton* do not directly consider the issue of whether a procedural due process claim can be stated in the context of a zoning decision. The Courts did decide that the procedural due process claims were without merit. In *Horizon Concepts, Inc. v. City of Balch Springs,* 789 F.2d 1165 (5th Cir. 1986), the Court rejected claims of deprivation of procedural due process because the Plaintiff had had opportunities to be heard and had ignored most of them. *Id.* at 1168-1169. Another post *Shelton* decision also held that there is no procedural due process claim where the Plaintiff had an adequate opportunity to be heard. *Abraham v. City of Mandeville,* 638 F. Supp. 1108, 1113 (E.D. La. 1986). The Fifth Circuit apparently has an undeclared policy of hearing procedural due process claims on zoning decisions. Therefore, the Court will consider Plaintiff's claim that Defendant under color of law deprived Plaintiff of his procedural due process rights.[1]

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[1] This conclusion is also supported by *Schafer v. City of New Orleans,* a pre *Shelton* case, which notes that there is no procedural due process deprivation where the Plaintiffs had actual notice of the introduction of the ordinance and appeared at the hearing preceding its adoption. *Schafer v. City of New Orleans,* 743 F.2d 1086, 1089 (5th Cir. 1984). The logical corollary is that when a person

Plaintiff claims that the following are uncontroverted facts that support his motion for summary judgment. Plaintiff owns certain property, which has been used for at least 10 years as a night club. During the six-month period prior to the adoption of § B-713, alcoholic beverages or mixed beverages were sold at Plaintiff's property. An ordinance granting a specific use permit to sell alcoholic beverages at Plaintiff's property was passed and approved on August 31, 1976. The property is and was, at the time of termination of the specific use permit, entirely within an area zoned "Commercial — office" by the Defendant. On November 27, 1985, Jose G. Gomez (Plaintiff's lessee) applied to the City for (i) an alcoholic beverage license; (ii) a dance hall license, and, (iii) a mechanical amusement device license. On December 2, 1985, the Defendant, by and through the City Secretary, denied all three of Mr. Gomez' applications pursuant to § B-713 of Defendant's Comprehensive Zoning Ordinance (the "Ordinance.") Plaintiff was not personally notified of any hearing at which time the City Council of the Defendant was to discuss adoption of the then-proposed § B-713 of the Ordinance (relating to the termination of specific use permits) or of any hearing at which time the City Council of the Defendant was to discuss adoption of the then proposed §§ B- 710 and B-711 of the Ordinance (relating to proposed requirements to obtain a specific use permit for the on-premise sale of alcoholic beverages.

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having a valuable property right is not notified of the introduction of the ordinance and is therefore unable to attend hearings, then his procedural due process rights are violated and he may seek redress. Surprisingly, Plaintiff does not cite this case, nor does Plaintiff raise the issue of whether it was deprived of procedural due process because it was not notified of the hearing for the adoption of the ordinances. Plaintiff only mentions that it received no notice of the hearing in connection with the state law claim that the ordinances are not valid. Since the issue is not raised or briefed, this Court will not decide it. *John Deere Co. v. American Nat. Bank, Stafford,* No. 86-2830, slip op. at 2371 (5th Cir. Feb. 17, 1987).

Defendant directly controverts Plaintiff's allegedly uncontroverted fact that the City Secretary of Defendant denied all of Mr. Gomez' applications pursuant to § B-713. *See* affidavit of Defendant City Secretary Sue Shawver. Therefore, Plaintiff is not entitled to summary judgment on his procedural due process claim, because there is a genuine issue of material fact as to whether the Defendant's City Secretary denied Plaintiff's lessee's applications pursuant to § B-713.

The Court now turns to the Defendant's motion for summary judgment. Defendant argues that it is entitled to summary judgment on the ground that it did not violate Plaintiff's procedural due process rights.

Defendant's summary judgment evidence is as follows. The Defendant has a procedure for requesting the right to use premises which was not utilized by Plaintiff. *See* affidavit of R. Clayton Hutchins, Defendant's City Attorney; affidavit of Jerry Sylo, Planning Technician of Defendant; Plaintiff's answer to Defendant's request for admission No. 2, (wherein Plaintiff admits that neither he nor his lessee has ever made application for a certificate of occupancy for the property in question). Plaintiff has not attempted to controvert Defendant's uncontroverted facts by means of any summary judgment evidence as required by Rule 56(e).[2]

Because Plaintiff has not applied for a certificate of occupancy, Plaintiff has not complied with Ordinance B-1001, which pro-

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[2] In its Response to Defendant's Motion for Summary Judgment and Reply to Defendant's Response to Plaintiff's Motion for Partial Summary Judgment, Plaintiff alleges that it is "undisputed that because Plaintiff's specific use permit had been terminated, any request for a Certificate of Occupancy would have been futile." Plaintiff does not supply or indicate any summary judgment evidence establishing that it is undisputed that such a request would have been "futile." Quite the contrary, the Court only sees Defendant's evidence that such a request, if made in conformance with the City's ordinances, would not have been futile. Plaintiff has not attempted to controvert such evidence.

vides[3] that before a building may be used, it must have been inspected to see that it complies with the City's Building Code. Because Plaintiff does not comply with B-1001, plaintiff does not comply with B-700. Ordinance B-700 provides [4] that before a person can use property for the sale or distribution and on-premise consumption of alcohol, he must first obtain a specific use permit and that to obtain such a permit, he must also comply with all other ordinances of the City, which would logically include B-1001.

The Court does not see how the Plaintiff can complain of having been deprived of property without procedural due process when the Plaintiff hasn't even attempted to use the procedures available to him.

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[3] B-1001: No building hereafter erected, converted or structurally altered shall be used, occupied or changed in use and no land may be used until a Certificate of Occupancy and Compliance shall have been issued by the Building inspector of the City of Grand Prairie stating that the building or proposed use of land or building complies with the provisions of this Ordinance and other building laws of the City of Grand Prairie.

[4] B-700 ALCOHOLIC BEVERAGES. SALE OR DISTRIBUTION AND ON-PREMISE CONSUMPTION OF:
ANY PERSON, FIRM OR CORPORATION THAT PROPOSES TO USE ANY PROPERTY IN THE CITY ZONED COMMERCIAL-OFFICE, COMMERCIAL, CENTRAL AREA, LIGHT INDUSTRIAL, HEAVY INDUSTRIAL, OR PLANNED DEVELOPMENT FOR THE SALE OR DISTRIBUTION AND ON-PREMISE CONSUMPTION OF ALCOHOLIC BEVERAGES SHALL BE REQUIRED TO OBTAIN SPECIFIC USE ZONING AFTER APPLICATION THEREFOR AND PUBLIC HEARING BEFORE THE PLANNING AND ZONING COMMISSION AND THE CITY COUNCIL AS OTHERWISE PROVIDED IN THE ZONING ORDINANCE OF THE CITY; PROVIDED THAT THE APPLICATION FOR SUCH LAND USE, IN ADDITION TO, BUT NOT LIMITATION OF, ANY OTHER REQUIREMENT IN SAID ZONING ORDINANCE, AS A CONDITION FOR THE SAID USAGE OF PROPERTY, COMPLY WITH ALL ORDINANCES, REGULATIONS AND CONDITIONS OF THE CITY OF GRAND PRAIRIE, AND ALL STATE AND FEDERAL LAWS AND REGULATIONS....

The Court therefore grants summary judgment for Defendant on the ground that there is no genuine issue of material fact concerning Defendant's summary judgment evidence, and the Defendant is entitled to judgment as a matter of law. *Horizon Concepts,* 789 F.2d at 1168-1169; *Abraham,* 638 F. Supp. at 1113.

Since Plaintiff's one federal claim has been dismissed, the Court declines to exercise pendent jurisdiction over Plaintiff's state claims. *Gibbs,* 383 U.S. at 726. Further, review of municipal zoning is within the domain of the states, *Shelton v. City of College Station,* 780 F.2d 475, 477 (5th Cir. 1986), and the district courts should avoid exercising pendent jurisdiction over a zoning matter *Smith v. City of Picayune,* 795 F.2d 482, 489 (5th Cir. 1986) (Higginbotham, J. concurring). Therefore, this Court dismisses the rest of the action without prejudice.

So ORDERED this 18th day of March, 1987.

/s/ ROBERT W. PORTER
ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

APPENDIX D

County Line Joint Venture
v.
Grand Prairie, Tex.

COUNTY LINE JOINT VENTURE,
Plaintiff-Appellant,

v.

The CITY OF GRAND PRAIRIE, TEXAS,
Defendant-Appellee.

No. 87-1304.

United States Court of Appeals,
Fifth Circuit.

March 18, 1988.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, BRIGHT,* and GEE, Circuit Judges.

BRIGHT, Circuit Judge:

County Line Joint Venture (County Line) brought suit for injunctive relief and monetary damages against the City of Grand Prairie, Texas (City) on the grounds that it violated County Line's constitutional and state-created rights by applying a city zoning ordinance which automatically extinguished County Line's specific use permit (SUP) for six months of non-use. The constitutional violations allegedly committed by the City include a denial of procedural due process, substantive due process, equal protection and fifth and fourteenth amendment taking. The dis-

trict court [1] granted summary judgment in favor of the City on the procedural due process issue and dismissed the entire action. We affirm the district court's grant of summary judgment as to the procedural due process issue but reverse the district court's dismissal of this action and remand for further proceedings consistent with this opinion.

I. BACKGROUND

County Line owns certain real property located in Grand Prairie, Texas. In 1976, County Line sought and received an SUP permitting it to sell alcoholic beverages on the premises.[2] In February 1985, the city council passed an ordinance entitled § B-713 which automatically terminates all SUPs that are not used for a period of six months.[3] The City gave public notice in a

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[1] The Hon. Robert W. Porter, Chief United States District Judge for the Northern District of Texas.

[2] The city zoned the property for commercial use. However, an SUP, as an amendment to the zoning ordinance, in this case permitted the sale of alcoholic beverages where they could not otherwise be sold.

[3] Section B-713 provides as follows:

> A. All specific use permits approved in accordance with the provisions of this ordinance in its original form or as hereafter amended shall automatically terminate upon cessation of the use for a period of six months, regardless of the intention of the owner.
>
> B. Any specific use permit granted by the City Council shall automatically terminate if a building permit has not been obtained on the premises within one year from the date the ordinance granting the specific use permit is adopted.
>
> C. On any tract of land for which a specific use permit has been granted and the use has ceased as of the date of this ordinance, such specific use permit shall automatically terminate six months after the adoption of this ordinance unless the use has been reinstated by that time.
>
> D. Specific use permits in existence as of the date of this ordinance shall automatically terminate one year from the date of this ordinance if a building permit has not been obtained by that time.
>
> Grand Prairie, Tex., Ordinances § B-713.

local newspaper that it was considering such an amendment and subsequently held a public hearing on the proposed ordinance.

On November 27, 1985, County Line's current tenant applied to the city secretary for an alcoholic beverage license, dance hall license, and a mechanical amusement device license. The city secretary checked the records to determine whether issuance of such licenses was appropriate. Her research disclosed that the property had been unoccupied for approximately one year and that pursuant to Ordinance § B-713, County Line no longer possessed an SUP. Because no license could be issued without an SUP, the secretary denied the license applications.

Following the city secretary's denial, County Line attempted to appeal the city secretary's decision regarding the SUP's termination to the zoning board of adjustments and appeals. The zoning board determined that it lacked jurisdiction to hear any complaint regarding a city secretary decision because the zoning board had jurisdiction over zoning matters which, by definition, did not include the city secretary's licensing decisions of an official of the city. County Line brought this claim for relief for violation of its civil rights and pendant state claims in United States District Court.

Both parties moved for summary judgment on the procedural due process claim. The district court granted summary judgment in favor of the City, and it apparently assumed that there were no other remaining federal claims. The district court then declined to exercise jurisdiction over the remaining pendant state law claims. With such a disposition, the district court granted a dismissal of the action. County Line then brought the present appeal.

We now turn to County Line's claim that its constitutional rights have been violated by the City of Grand Prairie.

II. DISCUSSION

A. Procedural Due Process

In an attempt to delineate the relationship between property owners' rights and zoning ordinances, courts and commentators indicate that the existence of procedural due process rights depends upon how the court views zoning ordinances and decisions. D. Mandelker, J. Gerand & E. Sullivan, *Federal Land Use Law,* § 2.03 (1986); *Developments in the Law — Zoning,* 91 Harv.L.Rev. 1427 (1978). The City asserts that this court should view the City's conduct in adopting and applying § B-713 as a legislative act.

[1] Generally, if the court views the governmental conduct as legislative, the property owner has no procedural due process rights. "When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process — the legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees." 2 R. Rotunda, J. Nowak & J. Young, *Treatises on Constitutional Law; Substance and Procedure,* § 17.8, p. 251 (1986). The large number of people affected by the legislative process ensures that the legislature will act reasonably. *Rogin v. Bensalem Township,* 616 F.2d 680, 693-94 (3d Cir. 1980), *cert. denied,* 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981).

County Line urges this court to view the ordinance and its application under an administrative/adjudicative model. County Line argues that it has a protectable property interest in the SUP and that the City violated its right to procedural due process when the City considered and enacted the statute without giving County Line personal notice. *See Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Further, County Line argues that the City violated County Line's right to procedural due process when the City failed to give County Line personal

notice and a hearing prior to the time the ordinance operated to extinguish its SUP. County Line also contends that the City violated its due process rights when the city secretary denied the requested licenses because County Line did not have the proper zoning.

[2] If the action of the city council is viewed as administrative/adjudicative, procedural due process rights may attach. These procedural rights follow only if the landowner establishes a property right created by state or local law. The amount of process due depends upon the balancing of interests as enunciated in *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).[4]

Conduct of a municipal body is likely to be deemed legislative when an elected group, such as a city council, makes a general zoning decision which applies to a large group of interests. Conversely, a municipal body's action may be more likely termed adjudicative if an appointed group, such as a zoning board, makes a specific decision regarding a specific piece of property. *See Developments, supra.*

As a preliminary matter to resolving whether the city council acted in an administrative or legislative capacity in enacting the ordinance, we review this court's decisions in *South Gwinnett Venture v. Pruitt,* 491 F.2d 5 (5th Cir.) (en banc), *cert. denied,* 416 U.S. 901, 94 S.Ct. 1625, 40 L.Ed.2d 119, *cert. denied,* 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974); *Couf v. DeBlaker,*

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[4] The court in *Mathews* identified three interests which must be balanced. Those factors are as follows:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S at 335, 96 S.Ct. at 903.

652 F.2d 585 (5th Cir.1981), *cert. denied,* 455 U.S. 921, 102 S.Ct. 1278, 71 L.Ed.2d 462 (1982); and *Shelton v. City of College Station,* 780 F.2d 475 (5th Cir.) (en banc), *cert. denied,* — U.S. —, 106 S.Ct. 3276, 91 L.Ed.2d 566, *cert. denied,* — U.S. —, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986).

In *Pruitt,* the plaintiffs/appellants owned land zoned partially for residential use and partially for commercial use. The landowners sought to have the property rezoned to accommodate apartments. The local planning commission recommended the change, but the county commissioners denied the request. The landowners asserted that the county commissioners violated the owners' rights to equal protection and due process of law when the commission, according to the owners, failed to explain the basis for its decision. The court, en banc, held that "local zoning is a quasi-legislative procedure, not subject to federal juridical consideration in the absence of arbitrary action." 491 F.2d at 7. The court went on to hold that this view is applicable to the adoption of comprehensive zoning plans as well as the reclassification of a particular piece of property.

Thus, *Pruitt* expresses the viewpoint that a zoning decision, made by an elected body such as a county commission, should be deemed legislative, not administrative.

In *Couf,* a developer purchased waterfront property with the intent of building condominiums. At the time of purchase, the zoning permitted the desired building. However, by the time the developer finally applied for a building permit, the city commission instructed the planning commission that all property on the waterfront, including the developer's property, be "down zoned," and the planning commission should refuse to accept applications for building permits. The developer asserted that he was deprived of his property without due process of law.

The court determined that *Pruitt* controlled the disposition of the procedural due process claim. The court stated, as follows:

> Our opinions repeatedly characterize local zoning decisions as "legislative" in nature. (Citations omitted.) If this word is used advisedly — as it appears to be — then the plaintiffs cannot complain of a denial of procedural due process, for no constitutional limitation on legislative procedure is relevant here. (Citations omitted.)

652 F.2d at 590. Again, this court reaffirmed its view that zoning decisions, at least those made by elected bodies, are legislative, thus no procedural due process rights apply.

In *Shelton*, the landowner sought a variance for the parking requirements which would be enforced if the landowner changed the type of business conducted on the premises. 780 F.2d at 477. All three attempts to convince the city zoning board to grant the variance failed. The landowner then brought suit, claiming a violation of substantive and procedural due process. The en banc court in *Shelton* not only reaffirmed the view that the procedural aspect of zoning decisions are viewed under the legislative model but also considered, at great length, whether a claim of substantive due process violation should be viewed under the legislative or administrative model. The court flatly rejected the administrative model in favor of the legislative model.

The dissent in *Shelton* took issue with the majority's conclusion that a zoning board of adjustment, as an appointed body with limited power, could be cloaked with the deference given to legislative actions. The dissent contended that an appointed body making specific decisions regarding specific property ought to be held to a higher standard. *See* 780 F.2d at 488 (Rubin & Tate, J.J., dissenting).

Although we recognize that circumstances may arise in which the zoning decision of a governmental body, such as a county commission or a city council, may require some precedural due process, the circumstances presented in this case do not call for such a ruling.

[3] The enactment of the ordinance was a result of a purely legislative act by the city council of Grand Prairie, an elected body which wields broad power to make a decision in the area of city planning and zoning. The ordinance in question applies generally to all SUPs in existence and those thereafter created. County Line presented no evidence that the city council aimed the ordinance specifically at County Line rather than calling for termination of all SUPs which had suffered non-use for a period of at least six months. Because the city council possesses extensive legislative powers and had enacted an ordinance general in scope, we must apply the legislative model to the ordinance here in question and reject County Line's argument that it has a cognizable claim for relief for violation of procedural due process.

[4] County Line's alternative argument — that the action by the city secretary deprived it of procedural due process — lacks any merit. The city secretary possessed no power to make zoning decisions. Thus, her decision had no effect on the existence or non-existence of the SUP. Indeed, the city secretary's decision could very well have been wrong.

This case has similarities to the circumstances revealed in *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). In *Texaco*, owners of severed mineral interests appealed the application of an Indiana statute which automatically extinguished a mineral interest if not used for a period of twenty years.[5] The statute did not provide for notice to the owner of the mineral estate prior to the lapse, but it did provide that the

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[5] The Indiana statute, known as the Mineral Lapse Act, Ind. Code §§ 32-5-11-1 to 8 (1976), provides that the owner of the mineral interest who fails to use the interest for a period of twenty years automatically loses the interest, with the interest reverting back to the surface owner. A use of the interest includes the actual or attempted production of minerals, or the paying of taxes or royalties. The owner could also prevent a lapse if the owner files a statement of claim with the local recorder of deeds.

surface owner may give notice to the mineral owner subsequent to the lapse.

The mineral interest owners argued a denial of procedural due process, first because the state failed to notify them of the requirements of the new law, and second because the statute did not require the surface owner to give notice prior to the lapse. The Supreme Court found no merit in either argument.

The Court rejected the argument that the mineral owner should have been given notice of the requirements of the new law even though the owner establishes a property interest. The Court stated that "[i]t is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."[6] *Id.* at 532, 102 S.Ct. at 793 (citing *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 45 S.Ct. 491, 494, 69 L.Ed. 953 (1925).

After holding that the mineral interest owners were presumed to know the contents of the lapse statute, the Court addressed the issue of whether, given that knowledge, the owners were entitled

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[6] The Court in *Texaco* also stated that "a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." 454 U.S. at 532, 102 S.Ct. at 793. The Court found that the two-year grace period, which allowed a mineral interest owner to protect an interest which would otherwise lapse upon the effective date of the statute, foreclosed any argument that the mineral interest owners did not have a reasonable opportunity to familiarize themselves with the law. In this case, the City did not provide a grace period. Rather, non-use for a six-month period after the effective date of the ordinance resulted in automatic extinguishment of the SUP. In light of the interest involved in this case, an SUP, compared with the interest involved in *Texaco*, a fee in the mineral interest, we determine that the six-month period in which County Line should have informed itself of the ordinance to be reasonable, particularly because the City gave public notice of its consideration and subsequent adoption of the ordinance. *See id.* (courts should show great deference to legislative judgment regarding adequacy of grace period).

to a pre-lapse notice from the surface owners. *Id.* 454 U.S., at 533, 102 S.Ct. at 794. The Court, after noting the difference between a self-executing statute and a subsequent judicial determination of a lapse, determined that the mineral interest owner is not entitled to notice of the application of the self-executing statute. In doing so, the Court held that the notice requirements of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), were inapplicable. As the Court in *Texaco* stated:

> The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of the Mineral Lapse Act. The due process standards of *Mullane* apply to an "adjudication" that is "to be accorded finality." The Court in *Mullane* itself distinguished the situation in which a State enacted a general rule of law governing the abandonment of property.

454 U.S. at 535, 102 S.Ct. at 795 (footnote omitted).[7]

County Line may have rights flowing from existing administrative remedies. Before opening for business, County Line must obtain a certificate of occupancy. Grand Prairie, Tex., Ordinances § B-1001. To obtain a certificate, the premises must be properly zoned. *See id.* If the City denies County Line's application for failure to have proper zoning (no SUP), the denial could be

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[7] The Court similarly rejected the owners' argument that they were entitled to specific notice and hearing based on *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (notice and hearing before driver's license suspension); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (notice and hearing before pre-judgment replevin order); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) (notice and hearing before termination of service by public utility). The Court noted that the above cases are different because, in those cases, the interests were "taken only after a specific determination that the deprivation was proper." 454 U.S. at 537, 102 S.Ct. at 796 (footnote omitted).

appealed to the zoning board of adjustment and appeals. In this way, the zoning board would have the jurisdiction and opportunity to hear the issue of the SUP extinguishment. If County Line obtained no relief from the zoning board, it could appeal the matter in state court. In this way, the decision of the zoning board and that of the courts are "to be accorded finality" and at these stages, we presume County Line will be given an opportunity to be heard. *See Texaco,* 454 U.S. at 535, 102 S.Ct. at 795.

B. Other Federal Claims

From a review of the pleadings we determine that, in addition to its procedural due process claim, County Line asserts that the ordinance violates County Line's rights to substantative due process and equal protection by being arbitrary and capricious and further that the termination constitutes an improper taking under the fifth and fourteenth amendments. County Line also asserts pendant state law violations. Both parties moved for summary judgment on the issues of procedural due process and state law violations. The district court's opinion did not address the other federal claims asserted by County Line. Thus, the claims are still pending before the district court. We observe that the district court may stay consideration of additional claims pending exhaustion by County Line of its administrative remedies, if any, or the district court may proceed to resolve these remaining matters.

III. CONCLUSION

Accordingly, we affirm the district court's grant of summary judgment for the City on the procedural due process issue. We remand the case for further consideration of the other federal claims and state claims pending any further administrative proceedings initiated by the appellant. AFFIRMED IN PART AND REMANDED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1304

County Line Joint Venture,
Plaintiff-Appellant,

versus

CITY OF GRAND PRAIRIE, TEXAS,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion 03/18/88, 5 Cir., 198_, _____ F.2d ____)
(April 19, 1988)

Before CLARK, Chief Judge, GEE and BRIGHT*, Circuit Judges.

PER CURIAM:

☒ The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

☐ The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of

Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
CHIEF JUDGE

* Senior judge from the 8th Circuit Court of Appeals, sitting by designation.

APPENDIX F

ORDINANCE No. 2750

AN ORDINANCE AMENDING THE ZONING MAP AND ORDINANCE SHOWING THE LOCATION, BOUNDARY AND USE OF CERTAIN PROPERTY BY THE GRANTING OF A SPECIFIC USE PERMIT FOR ON-SITE USE OF ALCOHOLIC BEVERAGES AT 2515-H WEST JEFFERSON, TO WIT: TRACT 6-I OUT OF THE TAPLEY HOLLAND SURVEY, ABSTRACT 750 TARRANT COUNTY, TEXAS; SAID ZONING MAP AND ORDINANCE PASSED ON JANUARY 27, 1971, AND RECORDED IN BOOK 8, PAGES 405 TO 509 OF THE ORDINANCE RECORDS OF THE CITY OF GRAND PRAIRIE, TEXAS; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH; CONTAINING A SAVINGS CLAUSE; AND TO BECOME EFFECTIVE UPON ITS PASSAGE AND APPROVAL.

WHEREAS, the owners of the property described hereinbelow filed application with the City of Grand Prairie, Texas, petitioning an Amendment of the Zoning Ordinance and Map of said City so as to obtain a specific use permit to allow on-site use of alcoholic beverages at 2515-H West Jefferson on said property which is presently zoned Commercial Office; and

WHEREAS, the Planning and Zoning Commission of Grand Prairie, Texas, held a public hearing on said application on August 23, 1976 after written notice of such public hearing before the Planning and Zoning Commission on the proposed specific use permit for on-site use of alcoholic beverages at 2515-H West Jefferson had been sent to owners of real property lying within 200 feet of the property on which the specific use permit for on-site use of alcoholic beverages at 2515-H West Jefferson is proposed, said Notice having been given not less than ten (10)

days before the date set for hearing to all such owners who rendered their said property for City taxes as the ownership appears on the last approved City Tax Roll, and such Notice being served by depositing the same, properly addressed and postage paid, in the City Post Office; and

WHEREAS, after consideration of said application, the Planning and Zoning Commission of the City of Grand Prairie, Texas voted unanimously to recommend to the City Council of Grand Prairie, Texas, that a specific use permit be granted to allow on-site use of alcoholic beverages at 2515-H West Jefferson on said property; and

WHEREAS, Notice was given of a further public hearing to be held by the City Council of the City of Grand Prairie, Texas, in the City Hall Plaza Building at 7:30 o'clock P.M. on August 31, 1976, to consider the advisability of amending the Zoning Ordinance and Map as recommended by the Planning and Zoning Commission, and all citizens and parties at interest were notified that they would have an opportunity to be heard, such Notice of the time and place of such hearing having been given at least fifteen (15) days prior to such hearing by publication in the Grand Prairie Daily News, Grand Prairie, Texas, a newspaper of general circulation in such municipality; and

WHEREAS, all citizens and parties at interest have been given an opportunity to be heard on all the matter of the proposed specific use permit and the City Council of the City of Grand Prairie, Texas, being informed as to the location and nature of the specific use proposed on said property, as well as the nature and usability of surrounding property, have found and determined that the property in question, as well as other property within the city limits of the City of Grand Prairie, Texas, has changed in character since the enactment of the original Zoning Ordinance to the extent that a specific use may be made of said property as herein provided and by reason of changed conditions, does con-

sider and find that this amendatory Ordinance should be enacted since its provisions are in the public interest and will promote the health, safety and welfare of the community.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

I.

That the Zoning Ordinance and Map of the City of Grand Prairie, Texas, showing the locations and boundaries of certain districts, and said Zoning Ordinance and Map having been made a part of an Ordinance entitled:

> "AN ORDINANCE AMENDING IN ITS ENTIRETY CHAPTER 36 OF THE CODE OF ORDINANCES KNOWN AS THE ZONING ORDINANCE OF THE CITY OF GRAND PRAIRIE, TEXAS, AS PASSED AND APPROVED BY THE CITY COUNCIL ON THE 27TH DAY OF JANUARY, 1971. TOGETHER WITH ALL AMENDMENTS THERETO AND ENACTING A REVISED ORDINANCE ESTABLISHING AND PROVIDING FOR ZONING REGULATIONS: CREATING USE DISTRICTS IN ACCORDANCE WITH A COMPREHENSIVE PLAN . . . ."

and passed and approved January 27, 1971, recorded in Ordinance Book 8, Pages 405 to 509, inclusive, as amended, is hereby further amended so as to establish a specific use permit numbered 212 for the purpose of on-site use of alcoholic beverages at 2515-H West Jefferson on the following described area:

Tract 6-I out of the Tapley Holland Survey, Abstract 750 Tarrant County, Texas.

II.

That the following terms and conditions are hereby imposed as a part of this ordinance:

NONE

III.

It is further provided that in case a section, clause, sentence or part of this Ordinance shall be deemed or adjudged by a Court of competent jurisdiction to be invalid, then such invalidity shall not affect, impair or invalidate the remainder of this Ordinance.

IV.

All ordinances or parts of ordinances in conflict herewith are specifically repealed.

V.

That this Ordinance shall be in full force and effect from and after its passage and approval.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this the 31st day of August, 1976.

/s/ WELDON PARKHILL
Mayor, City of Grand Prairie, Texas

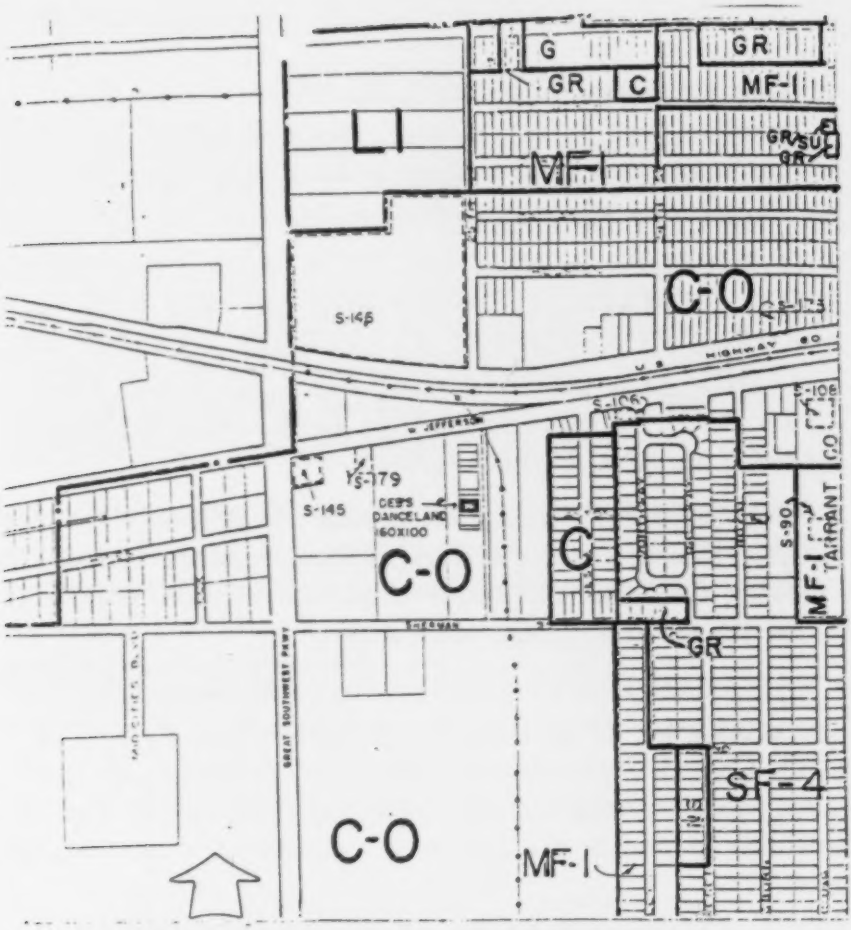
ATTEST:

/s/ MELBA FLAGG
City Secretary

APPROVED AS TO FORM AND LEGALITY:

/s/ R. CLAYTON HUTCHINS

P&Z Case No. 760203



PLANNING & ZONING COMMISSION

CITY COUNCIL

CASE NO. 760203

APPLICANT: DEB WOOD

REQUEST: C-O/SU ON SITE ALCOHOLIC BEV.

APPENDIX G

ORDINANCE NO. 3745

AN ORDINANCE AMENDING ORDINANCE NO. 2299, BEING THE COMPREHENSIVE ZONING ORDINANCE OF THE CITY OF GRAND PRAIRIE, TEXAS, BY ADDING THERETO A NEW SECTION B-713 PROVIDING FOR AUTOMATIC TERMINATION OF SPECIFIC USE PERMITS; CONTAINING A SAVINGS CLAUSE; REPEALING ALL ORDINANCES IN CONFLICT HEREWITH; AND TO BECOME EFFECTIVE UPON PASSAGE, APPROVAL AND PUBLICATION.

WHEREAS, the Planning and Zoning Commission of the City of Grand Prairie, Texas, met in regular session on the 11th day of February, 1985, after publication in the Grand Prairie Daily News on the 1st day of February, 1985; and

WHEREAS, after consideration and public hearing the Planning and Zoning Commission recommended to the City Council of the City of Grand Prairie, Texas, that Ordinance No. 2299, same being the comprehensive zoning ordinance of the City, be amended to provide for automatic termination of specific use permits.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

SECTION 1: THAT Ordinance No. 2299, same being the Comprehensive Zoning Ordinance of the City of Grand Prairie, Texas, is hereby amended by adding thereto a new Section B-713 related to termination of specific use permits, which section shall read in its entirety as follows:

"B-713. Termination of Specific Use Permits.

A. All specific use permits approved in accordance with the provisions of this ordinance in its original form or as hereafter amended shall automatically terminate upon cessation of the use for a period of six months, regardless of the intention of the owner.

B. Any specific use permit granted by the City Council shall automatically terminate if a building permit has not been obtained on the premises within one year from the date the ordinance granting the specific use permit is adopted.

C. On any tract of land for which a specific use permit has been granted and the use has ceased as of the date of this ordinance, such specific use permit shall automatically terminate six months after the adoption of this ordinance unless the use has been reinstated by that time.

D. Specific use permits in existence as of the date of this ordinance shall automatically terminate one year from the date of this ordinance if a building permit has not been obtained by that time."

SECTION 2: If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

SECTION 3: All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.

SECTION 4: THAT this ordinance shall be in full force and effect from and after its passage, approval and publication.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this the 19th day of February, 1985.

/s/ J. V. DEBO III
MAYOR, CITY OF
GRAND PRAIRIE, TEXAS

ATTEST:

/s/ SUE SHAWVER
City Secretary

APPENDIX H

CITY OF GRAND PRAIRIE
DEPARTMENT OF COMMUNITY DEVELOPMENT

Zoning Board of Adjustments and Appeals

Submittal Date: 12/17/85
Fee: $100
Received:

PLEASE TYPE OR PRINT

DESCRIPTION OF PROPERTY: The following information shall be provided:

LEGAL DESCRIPTION:

Metes and Bounds description of subject property or Lot _____, Block _____, Addition Name: SEE EXHIBIT "A" ATTACHED HERETO

GENERAL DESCRIPTION OF PROPERTY LOCATION: (ADDRESS)	2515 H. W. Jefferson Blvd. Grand Prairie, Texas 75051
PRESENT ZONING OF SUBJECT PROPERTY:	Commercial Office
REASON FOR APPEAL:	See attached Exhibit "E"

PLEASE TYPE OR PRINT

OWNER(S):	County Line Joint Venture
ADDRESS:	12770 Coit Road Suite 1009 — L.E. 54 Dallas, Texas 75251
PHONE#:	(214) 392-9728
APPLICANT:	Jose G. Gomez
ADDRESS:	1817 Lewis Trail Grand Prairie, Texas 75052
PHONE#:	(214) 601-7816

I hereby authorize Joseph G. Werner and Jane G. Allen to act in the capacity as my agent for the representation and/or presentation of this request.

Signature of Owner: _____

Agent (Please Print): Joseph G. Werner and Jane G. Allen

Signature of Agent: _____

Address of Agent: 3100 InterFirst Plaza — 901 Main Street
Dallas, Texas 75202

Phone # of Agent: (214) 670-0597

I understand that it is necessary for me or my authorized agent to be present at the Zoning Board of Adjustments and Appeals public hearing.

Signature of Owner: _____

Printed Name: William E. Schaid, Managing Partner of County Line Joint Venture

Mailing Address: 12770 Coit Road
Suite 1009 — L.B. 54
Dallas, Texas 75251

Phone # of Owner: (214) 392-9728

THE FOLLOWING SHALL BE ATTACHED TO THIS APPLICATION:

A Survey or plot plan of the subject property, showing the location of all structures and in a suitable submittal format as prescribed by the Department of Community Development (attached); and

A current property tax certification.

APPLICATION FOR

ZONING BOARD OF ADJUSTMENTS AND APPEALS

November 1985

THE ZONING BOARD OF ADJUSTMENTS AND APPEALS

The Zoning Board of Adjustments and Appeals shall review and act upon appeal requests for an advertised public hearing, held once each month. When the board judges that the public convenience and welfare will be substantially served and the appropriate use of the neighboring property will not be substantially or permanently injured, the Board may, after public notice and public hearing, and subject to appropriate conditions and safeguards, authorize special exceptions to the ordinance. Specifically, the Board may:

1) Permit the reconstruction, extension or enlargement of a building occupied by a non-conforming use.

2) Permit modification of the height, yard, area, coverage and parking regulations on land which has restricted area, shape, or slope.

3) Require the discontinuance of non-conforming uses of land or structure.

4) Hear appeals of any person aggrieved or affected by the decision of an administrative officer.

PUBLIC HEARINGS

The Zoning Board of Adjustments and Appeals meets on the 3rd Monday of each month.

DEADLINE

The deadline for filing an application is 12:00 noon on the Wednesday four (4) weeks prior to the applicable meeting.

FEES

The application fee for an appeal to the Zoning Board of Adjustments and Appeals is $100.00.

SUBMISSION

The applicant is responsible for submitting, at the time application is made, ten copies of the plot plan and any other required information.

APPLICATION PRESENTATION

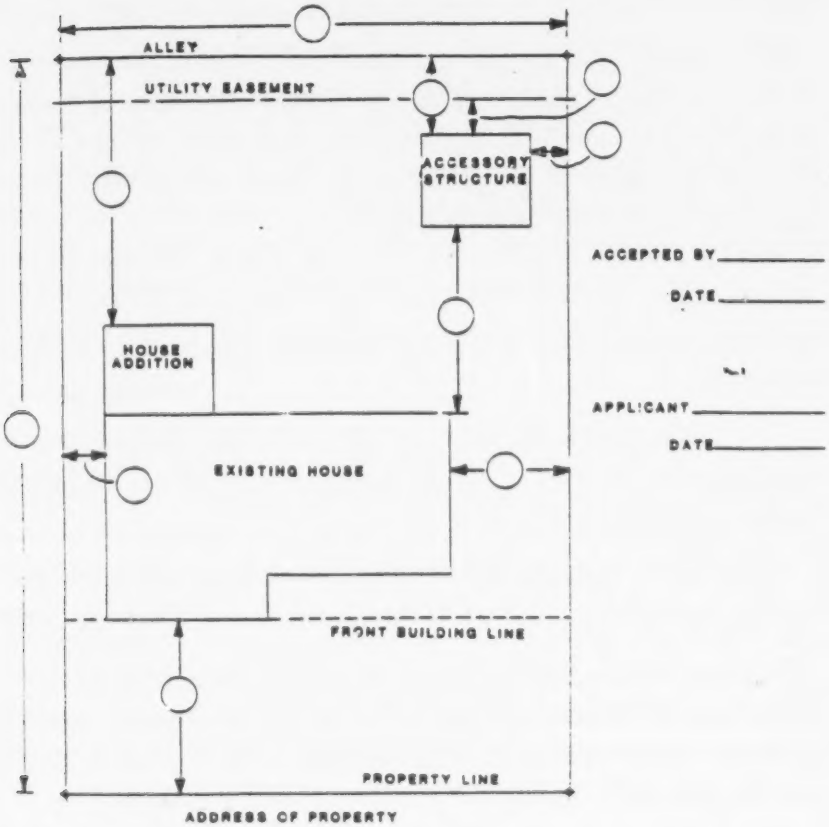
At the applicable public hearing, an applicant shall have a maximum of five (5) minutes to make a formal presentation of the project proposal. Although presentation of slides at the public hearing is at the discretion of the applicant, facilities for slide projection will be available. However, the applicant shall assume full responsibility for providing a properly prepared and compatible slide carousel to staff prior to the public hearing.

Use of transparencies on an overhead projector is another effective means of material presentation. However, due to the size and arrangement of the City Council Chambers, hand-held or tripod-mounted opaque renderings generally prove to be ineffective means of presentation. The use of slides is usually the preferred means of visual aid for project presentation.

IT IS VITALLY IMPORTANT TO YOU AS AN APPLICANT TO RETURN A FULLY COMPLETED APPLICATION PACKAGE. WITHOUT A COMPLETE APPLICATION ON FILE, THE VARIANCE REQUEST CANNOT BE PROCESSED AND WILL NOT BE PLACED ON A PUBLIC HEARING AGENDA.

ZONING BOARD OF ADJUSTMENTS

TYPICAL DIAGRAM FOR APPEAL



A final survey should have this information and may be substituted.

EXHIBIT "A"

BEING all that certain lot, tract or parcel of land situated in the TAPLEY HOLLAND SURVEY, ABSTRACT NO. 750, City of Grand Prairie, Tarrant County, Texas, and being more particularly described as follows:

BEGINNING at an iron rod found for corner in the South line of West Jefferson Boulevard at the Northwest corner of a called 25 acre tract owned by E. D. Douthitt, said corner being 475 feet, Easterly as measured along the South line of said West Jefferson Boulevard from the Westerly line of said TAPLEY HOLLAND SURVEY, ABSTRACT NO. 750 and North 81 deg. 24 min. 58 sec. East, 418.65 feet from the Southeast corner of the intersection of West Jefferson Boulevard with Great Southwest Parkway;

THENCE North 81 Deg. 24 Min. 58 Sec. East, along the South Line of West Jefferson Boulevard 418.60 feet to an iron rod found for corner;

THENCE South 00 deg. 38 min. 04 sec. East, 1084.09 feet to an iron rod found for corner in the North line of Sherman Street;

THENCE North 89 deg. 28 min. 07 sec. West, along the North line of Sherman Street, 412.80 feet to an iron rod found for corner in the West line of aforementioned called 25 acre tract of land owned by E. D. Douthitt;

THENCE North 00 deg. 44 min. 22 sec. West, along the West line of said Douthitt tract, 1017.80 feet to the PLACE OF BEGINNING and containing 9.980 Acres of Land and also being known as 2515 W. Jefferson Boulevard, Grand Prairie, Texas.

EXHIBIT "B"

On November 27, 1985, Owner's tenant, Jose G. Gomez, made application for an alcoholic beverage license, a dance hall license and a mechanical amusement device license for 2515H W. Jefferson Blvd. in Grand Prairie (copies of the applications are attached). The City Secretary denied the applications on December 2, 1985, stating that under Section B-713 of Grand Prairie's Comprehensive Zoning Ordinance (the "Ordinance") the specific use permit on 2515H W. Jefferson had expired, and that under Section B-710 and B-711 of the Ordinance, Gomez would be unable to obtain a new specific use permit to serve alcoholic beverages because he did not operate a restaurant.

Owner appeals the decision by the City Secretary for the following reasons:

1. The City Secretary erroneously concluded that the specific use permit had expired. Owner's building at 2515 W. Jefferson has been continously used to sell alcoholic beverages on premises in the same manner for approximately 20 years.

2. Sections B-710 and B-711 of the Zoning Ordinance are invalid because they are in violation of the Texas Alcoholic Beverage Code (the "TABC"). Section 109.31 of the TABC provides that "a City by charter may prohibit the sale of liquor in all or part of the residential sections of the City." Section 1.06 of the TABC provides:

> Unless otherwise specifically provided by the terms of this Code, the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be governed exclusively by the provisions of this Code.

Article XI, Section 5, of the Texas Constitution provides in pertinent part that:

> [N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State . . . .

The Ordinance prohibits the sale of alcoholic beverages for on-premise consumption except in restaurants that conform to the provisions of Sections B-710 and B-711. Owner's property is not in a residential area as provided by Section 109.31 of the TABC, but is, instead, in an area zoned commercial office. Further, Grand Prairie did not enact its prohibitions on the sale of alcoholic beverages by charter but instead did so by a zoning ordinance. The Legislature has stated in Section 1.06 that the sale of alcoholic beverages shall be governed exclusively by the provisions of the TABC. Grand Prairie's Zoning Ordinance is in violation of the TABC and the Texas Constitution.

3. Grand Prairie's Zoning Ordinance concerning on-premise consumption of alcoholic beverages is an unconstitutional taking of property and violates the Owner's rights under the Fourteenth Amendment of the United States Constitution.

In the event the Board of Adjustments finds that the City Secretary acted properly in denying the Application of Owner's tenant for the licenses, pursuant to article 1011(g)(3) of the Texas Revised Civil Statutes Annotated and the provisions of the Ordinance, Owner requests the Board of Adjustments to grant a variance and/or special exception to the Ordinance to permit Owner's tenant to obtain an alcoholic beverage license, a dance hall license and a mechanical amusement device license in accordance with his application. Owner would show that (1) such a variance and/or special exception would not be contrary to the public interest, (2) that special conditions exist in this situation

because Owner's building has been continuously used in the same manner for an extended period of time, and the use cannot be changed due to economic conditions and in view of existing leases on the building to which owner is contractually bound, and (3) that Owner and his tenant will suffer undue economical hardship if the variance and/or special exception is not granted.

City of
Grand Prairie

MEMO & ROUTING SLIP

ROUTE TO: CLAYTON HUTCHINS

	City Manager		Planning
	Assistant City Mgr.		Police
	City Secretary		Public Works
	Finance		Purchasing
	Fire		Tax
X	City Attorney		Inspection
	Parks & Recreation		Water
	Personnel		Health
	Municipal Court		Library

_ INFORMATION	_ SEE ME	_ CENTRAL FILE
X APPROVAL/SIG.	_ COMMENTS/REC.	_ TYPING
_ ACTION	_ REPLY TO	_ COPIES _____
_ YOUR FILES	_ AS REQUESTED	_ CIRCULATE

REMARKS: DOES THE ZONING BOARD OF ADJUSTMENTS HAVE JURISDICTION OVER THE CASES AT.

(1) 2332 NORWICH LN. YES

(2) 3830 VERDE WOODS YES

(3) 2515 H. W. JEFFERSON The Board has no jurisdiction RCH 1/7/86

FROM /s/ Jerry DATE JAN 2/86

PRIORITY

___ Immediate
___ For Next Agenda
X As Soon As Possible
___ At Your Convenience

(3)

No. 88-122

In The

Supreme Court of the United States

October Term, 1988

COUNTY LINE JOINT VENTURE,

Petitioner,

vs.

CITY OF GRAND PRAIRIE, TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

R. Clayton Hutchins
Grand Prairie City Attorney
George A. Staples, Jr.
Staples, Foster & Hampton
701 Texas Commerce Building
860 Airport Freeway West
Hurst, Texas 76054
(817) 281-2222
Attorneys for Respondent

September 16, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

S3

QUESTIONS PRESENTED

1. Is the owner of real property entitled to procedural due process notice and hearing either before or after such owner's right to use the property is adversely affected by amendments to the zoning ordinances enacted by a city's legislative body?

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TABLE OF AUTHORITIES

No. 88-122

—o—

In The
Supreme Court of the United States
October Term, 1988

—o—

COUNTY LINE JOINT VENTURE,
Petitioner,

vs.

CITY OF GRAND PRAIRIE, TEXAS,
Respondent.

—o—

OPPOSITION TO PETITION FOR CERTIORARI

—o—

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division (Porter, J.) (Appendix A, page 1a) is unreported. The opinion of the Court of Appeals (Appendix B, page 8a) is reported at 839 F.2d 1042.

—o—

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

A. Constitutional Provisions.

The constitutional provisions here involved are the due process clauses of the Fifth and Fourteenth Amendments.

B. Statutes.

The statutory provisions here involved are Sections 211.008 through 211.011, Texas Local Government Code (formerly Article 1011g, Texas Revised Civil Statutes) (Appendix C, page 19a).

C. Ordinances.

The ordinances here involved are Section D-100 of Grand Prairie's Comprehensive Zoning Ordinance (Appendix D, page 28a), City of Grand Prairie Ordinances 2750 and 3745, found in Respondent's Appendix E, page 31a, and Appendix F, page 36a.

STATEMENT OF THE CASE

This case involves the amendment by a city of its zoning ordinance to eliminate permitted uses which cease for more than six months. The Grand Prairie City Council zoned Petitioner's property to permit a number of activities including, by reason of a "specific use permit" zon-

ing overlay ordinance (Appendix E, page 31a), alcoholic beverage sales. Subsequently the City amended its zoning ordinance to provide that all such specific use permits would terminate if the use ceased for six months (Appendix F, page 36a).

The City had a procedure whereby a certificate of occupancy could be requested from the building official and, if denied, appealed to the Zoning Board of Adjustment (Appendix D, page 28a) and from thence to the Texas courts as contemplated by Section 211.011, Texas Local Government Code (formerly Article 1011g, Texas Revised Civil Statutes) (Appendix C, page 23a).

The City also had ordinances requiring licenses for alcoholic beverage sales, dance halls and amusement devices, which are administered by the city secretary. No appeal process existed for a denial of these licenses.

It is uncontested that Petitioner's previous tenant held licenses, that he abandoned the property and the licenses expired. More than six months later a new applicant sought new license and these were denied by the city secretary based on the ordinance terminating the specific use permit.

Although Petitioner could have requested a certificate of occupancy and if denied, appeal to the Zoning Board of Adjustment, it instead tried to appeal the city secretary's license denial to the Zoning Board of Adjustment and when this appeal was rejected on jurisdictional grounds (Appendix G, page 39a), Petitioner filed this suit.

———o———

ARGUMENT

The single decision cited by Petitioner as establishing a conflict among circuits is *Kerly Industries, Inc. vs. Pima County*, 785 F.2d 1444 (9th Cir. 1986), which involved the rights created under a permit granted by a statutory County Air Quality Control District. Such permits were defined by Arizona statutes, which also established provisions for their suspension and revocation. The Ninth Circuit held that these state statutes created a property right sufficient to require procedural due process prior to cancellation of such permit. The Ninth Circuit also held that the letter of a district employee declaring the permit null and void was itself a nullity because he had no such power, and therefore there was no deprivation of property without due process. This holding is entirely consistent with the case at bar and there is no conflict between the Third and Fifth Circuits on any issue involved in the two cases.

In the case at bar, Petitioner complains that the city secretary deprived it of a specific use permit and denied a third party certain licenses not under the zoning ordinance but which could not be granted in the absence of proper zoning. As noted by the Fifth Circuit in the case below, the city secretary had no power to make zoning decisions. Fifth Circuit decision at Appendix B, page 10a. (Also see Appendix G, page 39a). The specific use permit was created by ordinance of a legislative body, the City Council (Appendix E, page 31a). This permit was amended by ordinance of the same body to provide that it would "automatically terminate upon cessation of the

use for a period of six months, regardless of the intention of the owner." (Appendix F, page 36a).

Neither Petitioner nor its prospective tenant Gomez ever held any of the licenses which the city secretary refused to issue Gomez. There are no statutory provisions dealing with such licenses. In the absence of any such licenses or statutes there was no deprivation of any property right.

Furthermore, since Gomez is not a party to this action, Petitioner cannot be said to have been denied a procedural due process right by the city secretary's denial of licenses to Gomez.

The court below did an excellent job of analyzing the Fifth Circuit's position on the issue of whether the City Council acted in an administrative or legislative capacity in enacting the ordinance of which Petitioner complains. Although the court could have relied on its many precedents (Appendix B, page 15a) which clearly hold that all zoning decisions by a governmental body are purely legislative, the opinion written by Justice Bright, Senior Judge from the Eighth Circuit sitting by designation refuses to rule so broadly and holds only that the ordinance enactment was a purely legislative act thus negating any possibility of the existence of a procedural due process requirement.

No case cited by Petitioner suggests that there is any requirement for procedural, as distinguished from substantive, due process as a condition to the acts of a legislative body in amending zoning ordinances. There is considerable precedent to the contrary. *Texaco, Inc. vs.*

Short, 454 U.S. 516, 106 S.Ct. 781, 70 L.Ed.2d 738 (1982); *Couf vs. DeBlaker*, 652 F.2d 585 (5th Cir. 1981), cert. denied, 455 U.S. 921, 102 S.Ct. 1278, 71 L.Ed.2d 462 (1982); *Shelton vs. City of College Station*, 780 F.2d 475 (5th Cir. 1986) (rehearing en banc), cert. denied, — U.S. —, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986).

Lastly, Petitioner's Application for a Writ of Certiorari is simply premature. The Fifth Circuit decision determined only that Petitioner cannot recover under a procedural due process theory. The case was remanded for further consideration of the other Federal claims and State claims pending. Except in extraordinary instances, a Writ of Certiorari is not issued until a final decree. *The Conqueror*, 166 U.S. 110, 17 S.Ct. 510, 41 L.Ed. 937 (1897); *Hamilton-Brown Shoe Co. vs. Wolf Brothers and Co.*, 240 U.S. 251, 36 S.Ct. 269, 60 L.Ed. 629 (1916). This case involves no conflict between the decisions of Federal Courts of different circuits as to the procedural due process claim. The case at bar is not ripe for adjudication by the Supreme Court because there has been no final adjudication of Petitioner's rights to recover under its remaining State and Federal theories.

———o———

CONCLUSION

The city secretary did not terminate Petitioner's zoning status; this was terminated by an amendment of the City's zoning ordinance by its City Council, a legislative act. Petitioner has no procedural due process protection from legislative acts. There is no conflict between circuits on this issue. The decree for which review is sought is not final.

For all of the foregoing reasons, a Writ of Certiorari should be denied in this case.

Respectfully submitted,

STAPLES, FOSTER & HAMPTON and
R. CLAYTON HUTCHINS, CITY ATTORNEY

by: /s/ GEORGE A. STAPLES, JR.
George A. Staples, Jr.
701 Texas Commerce Building
860 Airport Freeway West
Hurst, Texas 76054
(817) 281-2222
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE TO:

Mr. Wm. Charles Bundren
JACKSON & WALKER
6000 First RepublicBank Plaza
Dallas, Texas 75202

No. 88-122

—o—

In The
Supreme Court of the United States
October Term, 1988

—o—

COUNTY LINE JOINT VENTURE,
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—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

APPENDIX TO OPPOSITION TO PETITION FOR CERTIORARI

—o—

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COUNTY LINE JOINT VENTURE	)	
vs.	)	No. CA3-86-1919-F
CITY OF GRAND PRAIRIE, TEXAS	)	

ORDER

Before the Court come cross motions for summary judgment. The Court hereby denies Plaintiff's motion and grants Defendant's motion.

This dispute arises from a change in zoning ordinances.

Plaintiff seeks basically three things. First, Plaintiff wants a judgment declaring that the lack of any procedural mechanism to appeal or otherwise challenge the decision of the city secretary constitutes a denial of Plaintiff's procedural due process rights. Second, he wants a judgment declaring the ordinance unconstitutional under the Texas Constitution. Third, he wants an injunction enjoining the City from enforcing its ordinances. Plaintiff claims a denial of substantive due process (Complaint ¶ 5.5) but does not raise this in his motion for summary judgment. The questions of whether Defendant's ordinances are unconstitutional or invalid are not federal questions; these are questions of state law and the Court has pendent jurisdiction over them. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Summary judgment is appropriate when there is no issue of material fact and it is clear that the movant is

entitled to judgment as a matter of law. See Rule 56(c); *Joe Reguiera, Inc. v. American Distilling Co., Inc.*, 642 F.2d 826, 829 (5th Cir. 1981). When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, *shall* be entered against him. Rule 56(e) (emphasis added).

The Court first considers Plaintiff's motion for summary judgment and first considers Plaintiff's claim that Defendant under color of law deprived Plaintiff of his procedural due process rights.

It is not clear whether a Plaintiff can state a claim for the violation of his procedural due process rights in the context of a zoning case at all. Traditionally, zoning decisions were considered legislative and therefore no Plaintiff could complain of procedural due process violations. The Fifth Circuit has said that "Our opinions repeatedly characterize local zoning decisions as 'legislative' in nature. If this word is used advisedly—as it appears to be—then the plaintiffs cannot complain of a denial of procedural due process, for no constitutional limitation on legislative procedure is relevant here. Most of the cases developing procedural limitations on government action involve challenges to administrative decisions. The plaintiffs do not cite a single federal case that even discusses procedural requirements for zoning matters, let alone one that reverses a zoning decision because of a procedural

failure." *Couf v. DeBlaker*, 652 F.2d 585, 590 (5th Cir. 1981). The Fifth Circuit held that "The *only* question which federal district courts may consider is whether the action of the zoning commission is arbitrary and capricious, having no substantial relation to the general welfare." *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 7 (1974) (en banc) (emphasis added). The Court stated that such a procedural due process claim was rightfully dismissed at the district court level. *Id.*

Whether this is still the rule is uncertain. The Fifth Circuit held in another zoning case that "Even when the deprivation of a property right triggers procedural due process standards that may require a state agency to be able to point to a rational basis employed in reaching its decision, as opposed to a basis later hypothesized by others, nothing requires proof of *the*, as distinguished from *a*, basis of decision." *Shelton v. City of College Station*, 780 F.2d 475, 484 (5th Cir. 1986) (en banc). However, the same decision holds that "whatever be the role of procedural due process here, we are persuaded, as were the district court and the panel, that [a board member's] mere membership in a church that also opposed the grant of the variances does not by itself establish bias . . . ." *Id.* at 485-486. The dissent reads the majority as having admitted that procedural due process scrutiny might properly apply to a Zoning Board's decision. *Id.* at 488.

The only similar cases to handle this issue after *Shelton* do not directly consider the issue of whether a procedural due process claim can be stated in the context of a zoning decision. The Courts did decide that the procedural due process claims were without merit. In *Horizon Con-*

cepts, Inc. v. City of Balch Springs, 789 F.2d 1165 (5th Cir. 1986), the Court rejected claims of deprivation of procedural due process because the Plaintiff had had opportunities to be heard and had ignored most of them. *Id.* at 1168-1169. Another post *Shelton* decision also held that there is no procedural due process claim where the Plaintiff had an adequate opportunity to be heard. *Abraham v. City of Mandeville*, 638 F. Supp. 1108, 1113 (E.D. La. 1986). The Fifth Circuit apparently has an undeclared policy of hearing procedural due process claims on zoning decisions. Therefore, the Court will consider Plaintiff's claim that Defendant under color of law deprived Plaintiff of his procedural due process rights.[1]

Plaintiff claims that the following are uncontroverted facts that support his motion for summary judgment. Plaintiff owns certain property, which has been used for at least 10 years as a night club. During the six-month period prior to the adoption of § B-713, alcoholic beverages

---

[1]This conclusion is also supported by *Schafer v City of New Orleans*, a pre *Shelton* case, which notes that there is no procedural due process deprivation where the Plaintiffs had actual notice of the introduction of the ordinance and appeared at the hearing preceding its adoption. *Schafer v. City of New Orleans*, 743 F.2d 1086, 1089 (5th Cir. 1984). The logical corollary is that when a person having a valuable property right is not notified of the introduction of the ordinance and is therefore unable to attend hearings, then his procedural due process rights are violated and he may seek redress. Suprisingly, Plaintiff does not cite this case, nor does Plaintiff raise the issue of whether it was deprived of procedural due process because it was not notified of the hearing for the adoption of the ordinances. Plaintiff only mentions that it received no notice of the hearing in connection with the state law claim that the ordinances are not valid. Since the issue is not raised or briefed, this Court will not decide it. *John Deere Co. v. American Nat. Bank, Stafford*, No. 86-2830, slip op. at 2371 (5th Cir. Feb. 17, 1987).

or mixed beverages were sold at Plaintiff's property. An ordinance granting a specific use permit to sell alcoholic beverages at Plaintiff's property was passed and approved on August 31, 1976. The property is and was, at the time of termination of the specific use permit, entirely within an area zoned "Commercial—office" by the Defendant. On November 27, 1985, Jose G. Gomez (Plaintiff's lessee) applied to the City for (i) an alcoholic beverage license; (ii) a dance hall license, and, (iii) a mechanical amusement device license. On Deccember 2, 1985, the Defendant, by and through the City Secretary, denied all three of Mr. Gomez' applications pursuant to § B-713 of Defendant's Comprehensive Zoning Ordinance (the "Ordinance.") Plaintiff was not personally notified of any hearing at which time the City Council of the Defendant was to discuss adoption of the then-proposed § B-713 of the Ordinance relating to the termination of specific use permits) or of any hearing at which time the City Council of the Defendant was to discuss adoption of the then proposed §§ B-710 and B-711 of the Ordinance (relating to proposed requirements to obtain a specific use permit for the on-premise sale of alcoholic beverages.

Defendant directly controverts Plaintiff's allegedly uncontroverted fact that the City Secretary of Defendant denied all of Mr. Gomez' applications pursuant to § B-713. *See* affidavit of Defendant City Secretary Sue Shawver. Therefore, Plaintiff is not entitled to summary judgment on his procedural due process claim, because there is a genuine issue of material fact as to whether the Defendant's City Secretary denied Plaintiff's lessee's applications pursuant to § B-713.

The Court now turns to the Defendant's motion for summary judgment. Defendant argues that it is entitled to summary judgment on the ground that it did not violate Plaintiff's procedural due process rights.

Defendant's summary judgment evidence is as follows. The Defendant has a procedure for requesting the right to use premises which was not utilized by Plaintiff. *See* affidavit of R. Clayton Hutchins, Defendant's City Attorney; affidavit of Jerry Sylo, Planning Technician of Defendant; Plaintiff's answer to Defendant's request for admission No. 2, (wherein Plaintiff admits that neither he nor his lessee has ever made application for a certificate of occupancy for the property in question). Plaintiff has not attempted to controvert Defendant's uncontroverted facts by means of any summary judgment evidence as required by Rule 56(e).[2]

Because Plaintiff has not applied for a certificate of occupancy, Plaintiff has not complied with Ordinance

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[2]In its Response to Defendant's Motion for Summary Judgment and Reply to Defendant's Response to Plaintiff's Motion for Partial Summary Judgment, Plaintiff alleges that it is "undisputed that because Plaintiff's specific use permit had been terminated, any request for a Certificate of Occupancy would have been futile." Plaintiff does not supply or indicate any summary judgment evidence establishing that it is undisputed that such a request would have been "futile." Quite the contrary, the Court only sees Defendant's evidence that such a request, if made in conformance with the City's ordinances, would not have been futile. Plaintiff has not attempted to controvert such evidence.

B-1001, which provides[3] that before a building may be used, it must have been inspected to see that it complies with the City's Building Code. Because Plaintiff does not comply with B-1001, plaintiff does not comply with B-700. Ordinance B-700 provides[4] that before a person can use property for the sale or distribution and on-premise consumption of alcohol, he must first obtain a specific use permit and that to obtain such a permit, he must also comply with all other ordinances of the City, which would logically include B-1001.

The Court does not see how the Plaintiff can complain of having been deprived of property without procedural due process when the Plaintiff hasn't even attempted to use the procedures available to him.

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[3]B-1001: No building hereafter erected, converted or structurally altered shall be used, occupied or changed in use and no land may be used until a Certificate of Occupancy and Compliance shall have been issued by the Building inspector of the City of Grand Prairie stating that the building or proposed use of land or building complies with the provisions of this Ordinance and other building laws of the City of Grand Prairie.

[4]B-700 ALCOHOLIC BEVERAGES. SALE OR DISTRIBUTION AND ON-PREMISE CONSUMPTION OF:

ANY PERSON, FIRM OR CORPORATION THAT PROPOSES TO USE ANY PROPERTY IN THE CITY ZONED COMMERCIAL-OFFICE, COMMERCIAL, CENTRAL AREA, LIGHT INDUSTRIAL, HEAVY INDUSTRIAL, OR PLANNED DEVELOPMENT FOR THE SALE OR DISTRIBUTION AND ON-PREMISE CONSUMPTION OF ALCOHOLIC BEVERAGES SHALL BE REQUIRED TO OBTAIN SPECIFIC USE ZONING AFTER APPLICATION THEREFOR AND PUBLIC HEARING BEFORE THE PLANNING AND ZONING COMMISSION AND THE CITY COUNCIL AS OTHERWISE PROVIDED IN THE ZONING ORDINANCE OF THE CITY; PROVIDED THAT THE APPLICATION FOR SUCH LAND USE, IN ADDITION TO, BUT NOT LIMITATION OF, ANY OTHER REQUIREMENT IN SAID ZONING ORDINANCE, AS A CONDITION FOR THE SAID USAGE OF PROPERTY, COMPLY WITH ALL ORDINANCES, REGULATIONS AND CONDITIONS OF THE CITY OF GRAND PRAIRIE, AND ALL STATE AND FEDERAL LAWS AND REGULATIONS. . . .

The Court therefore grants summary judgment for Defendant on the ground that there is no genuine issue of material fact concerning Defendant's summary judgment evidence, and the Defendant is entitled to judgment as a matter of law. *Horizon Concepts,* 789 F.2d at 1168-1169; *Abraham,* 638 F.Supp. at 1113.

Since Plaintiff's one federal claim has been dismissed, the Court declines to exercise pendent jurisdiction over Plaintiff's state claims. *Gibbs,* 383 U.S. at 726. Further, review of municipal zoning is within the domain of the states, *Shelton v. City of College Station,* 780 F.2d 475, 477 (5th Cir. 1986), and the district courts should avoid exercising pendent jurisdiction over a zoning matter *Smith v. City of Picayune,* 795 F.2d 482, 489 (5th Cir. 1986) (Higginbotham, J. concurring). Therefore, this Court dismisses the rest of the action without prejudice.

So ORDERED this 18th day of March, 1987.

/s/ Robert W. Porter
ROBERT W. PORTER
UNITED STATES DISTRICT
JUDGE

APPENDIX B

County Line Joint Venture

v.

Grand Prairie, Tex.

COUNTY LINE JOINT VENTURE,

Plaintiff-Appellant,

v.

THE CITY OF GRAND PRAIRIE, TEXAS,

Defendant-Appellee.

No. 87-1304.

United States Court of Appeals,
Fifth Circuit.

March 18, 1988.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, BRIGHT,* and GEE, Circuit Judges.

BRIGHT, Circuit Judge:

County Line Joint Venture (County Line) brought suit for injunctive relief and monetary damages against the City of Grand Prairie, Texas (City) on the grounds that it violated County Line's constitutional and state-created rights by applying a city zoning ordinance which automatically extinguished County Line's specific use permit (SUP) for six months of non-use. The constitutional vio-

lations allegedly committed by the City include a denial of procedural due process, substantive due process, equal protection and fifth and fourteenth amendment taking. The district court[1] granted summary judgment in favor of the

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City on the procedural due process issue and dismissed the entire action. We affirm the district court's grant of summary judgment as to the procedural due process issue but reverse the district court's dismissal of this action and remand for further proceedings consistent with this opinion.

I. BACKGROUND

County Line owns certain real property located in Grand Prairie, Texas. In 1976, County Line sought and received an SUP permitting it to sell alcoholic beverages on the premises.[2] In February 1985, the city council passed an ordinance entitled § B-713 which automatically terminates all SUPs that are not used for a period of six months.[3] The City gave public notice in a local newspaper

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[1]The Hon. Robert W. Porter, Chief United States District Judge for the Northern District of Texas.

[2]The city zoned the property for commercial use. However, an SUP, as an amendment to the zoning ordinance, in this case permitted the sale of alcoholic beverages where they could not otherwise be sold.

[3]Section B-71 provides as follows:

> A. All specific use permits approved in accordance with the provisions of this ordinance in its original form or as hereafter amended shall automatically terminate upon cessation of the use for a period of six months, regardless of the intention of the owner.

(Continued on following page)

that it was considering such an amendment and subsequently held a public hearing on the proposed ordinance.

On November 27, 1985, County Line's current tenant applied to the city secretary for an alcoholic beverage license, dance hall license, and a mechanical amusement device license. The city secretary checked the records to determine whether issuance of such licenses was appropriate. Her research disclosed that the property had been unoccupied for approximately one year and that pursuant to Ordinance § B-713, County Line no longer possessed an SUP. Because no license could be issued without an SUP, the secretary denied the license applications.

Following the city secretary's denial, County Line attempted to appeal the city secretary's decision regarding the SUP's termination to the zoning board of adjustments and appeals. The zoning board determined that it lacked jurisdiction to hear any complaint regarding a city secretary decision because the zoning board had jurisdiction

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(Continued from previous page)

B. Any specific use permit granted by the City Council shall automatically terminate if a building permit has not been obtained on the premises within one year from the date the ordinance granting the specific use permit is adopted.

C. On any tract of land for which a specific use permit has been granted and the use has ceased as of the date of this ordinance, such specific use permit shall automatically terminate six months after the adoption of this ordinance unless the use has been reinstated by that time.

D. Specific use permits in existence as of the date of this ordinance shall automatically terminate one year from the date of this ordinance if a building permit has not been obtained by that time.
Grand Prairie, Tex., Ordinances § B-713.

over zoning matters which, by definition, did not include the city secretary's licensing decisions of an official of the city. County Line brought this claim for relief for violation of its civil rights and pendant state claims in United States District Court.

Both parties moved for summary judgment on the procedural due process claim. The district court granted summary judgment in favor of the City, and it apparently assumed that there were no other remaining federal claims. The district court then declined to exercise jurisdiction over the remaining pendant state law claims. With such a disposition, the district court granted a dismissal of the action. County Line then brought the present appeal.

We now turn to County Line's claim that its constitutional rights have been violated by the City of Grand Prairie.

II. DISCUSSION

A. Procedural Due Process

In an attempt to delineate the relationship between property owners' rights and zoning ordinances, courts and commentators indicate that the existence of procedural due process rights depends upon how the court views zoning ordinances and decisions. D. Mandelker, J. Gerand & E. Sullivan, *Federal Land Use Law,* § 2.03 (1986); *Developments in the Law—Zoning,* 91 Harv.L.Rev. 1427 (1978). The City asserts that this court should view the City's conduct in adopting and applying § B-713 as a legislative act.

Generally, if the court views the governmental conduct as legislative, the property owner has no procedural due

process rights. "When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process—the legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees." 2 R. Rotunda, J. Nowak & J. Young, *Treatises on Constitutional Law; Substance and Procedure,* § 17.8, p. 251 (1986). The large number of people affected by the legislative process ensures that the legislature will act reasonably. *Rogin v. Bensalem Township,* 616 F.2d 680, 693-94 (3d Cir. 1980), *cert. denied,* 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981).

County Line urges this court to view the ordinance and its application under an administrative/adjudicative model. County Line argues that it has a protectable property interest in the SUP and that the City violated its right to procedural due process when the City considered and enacted the statute without giving County Line personal notice. *See Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed2d 548 (1972). Further, County Line argues that the City violated County Line's right to procedural due process when the City failed to give County Line personal notice and a hearing prior to the time the ordinance operated to extinguish its SUP. County Line also contends that the City violated its due process rights when the city secretary denied the requested licenses because County Line did not have the proper zoning.

If the action of the city council is viewed as administrative/adjudicative, procedural due process rights may attach. These procedural rights follow only if the landowner establishes a property right created by state or

local law. The amount of process due depends upon the balancing of interests as enunciated in *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).[4]

Conduct of a municipal body is likely to be deemed legislative when an elected group, such as a city council, makes a general zoning decision which applies to a large group of interests. Conversely, a municipal body's action may be more likely termed adjudicative if an appointed group, such as a zoning board, makes a specific decision regarding a specific piece of property. *See Developments, supra.*

As a preliminary matter to resolving whether the city council acted in an administrative or legislative capacity in enacting the ordinance, we review this court's decision in *South Gwinnett Venture v. Pruitt,* 491 F.2d 5 (5th Cir.) (en banc), *cert. denied,* 416 U.S. 901, 94 S. Ct. 1625, 40 L.Ed.2d 119, *cert. denied,* 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed2d 64 (1974); *Couf v. DeBlaker,* 652 F.2d 585 (5th Cir.1981), *cert. denied,* 455 U.S. 921, 102 S.Ct. 1278, 71 L.Ed.2d 462 (1982); and *Shelton v City of College Station,* 780 F.2d 475 (5th Cir.) (en banc), *cert. denied,*—U.S.—, 106 S.Ct. 3276, 91 L.Ed2d 566, *cert. denied,*—U.S.—, 107 S.Ct. 89, 93 L.Ed2d 41 (1986)

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[4]The court in *Mathews* identified three interests which must be balanced. Those factors are as follows:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, 96 S.Ct. at 903.

In *Pruitt,* the plaintiffs/appellants owned land zoned partially for residential use and partially for commercial use. The landowners sought to have the property rezoned to accommodate apartments. The local planning commission recommended the change, but the county commissioners denied the request. The landowners asserted that the county commissioners violated the owners' rights to equal protection and due process of law when the commission, according to the owners, failed to explain the basis for its decision. The court, en banc, held that "local zoning is a quasi-legislative procedure, not subject to federal juridical consideration in the absence of arbitrary action." 491 F.2d at 7. The court went on to hold that this view is applicable to the adoption of comprehensive zoning plans as well as the reclassification of a particular piece of property.

Thus, *Pruitt* expresses the viewpoint that a zoning decision, made by an elected body such as a county commission, should be deemed legislative, not administrative.

In *Couf,* a developer purchased waterfront property with the intent of building condominiums. At the time of purchase, the zoning permitted the desired building. However, by the time the developer finally applied for a building permit, the city commission instructed the planning commission that all property on the waterfront, including the developer's property, be "down zoned," and the planning commission should refuse to accept applications for building permits. The developer asserted that he was deprived of his property without due process of law.

The court determined that *Pruitt* controlled the disposition of the procedural due process claim. The court stated, as follows:

> Our opinions repeatedly characterize local zoning decisions as "legislative" in nature. (Citations omitted.) If this word is used advisedly—as it appears to be—then the plaintiffs cannot complain of a denial of procedural due process, for no constitutional limitation on legislative procedure is relevant here. (Citations omitted.)

652 F.2d at 590. Again, this court reaffirmed its view that zoning decisions, at least those made by elected bodies, are legislative, thus no procedural due process rights apply.

In *Sheldon,* the landowner sought a variance for the parking requirements which would be enforced if the landowner changed the type of business conducted on the premises. 780 F.2d at 477. All three attempts to convince the city zoning board to grant the variance failed. The landowner then brought suit, claiming a violation of substantive and procedural due process. The en banc court in *Shelton* not only reaffirmed the view that the procedural aspect of zoning decisions are viewed under the legislative model but also considered, at great length, whether a claim of substantive due process violation should be viewed under the legislative or administrative model. The court flatly rejected the administrative model in favor of the legislative model.

The dissent in *Shelton* took issue with the majority's conclusion that a zoning board of adjustment, as an appointed body with limited power, could be cloaked with the deference given to legislative actions. The dissent contended that an appointed body making specific decisions regarding specific property ought to be held to a higher standard. *See* 780 F.2d at 488 (Rubin & Tate, J.J., dissenting).

Although we recognize that circumstances may arise in which the zoning decision of a governmental body, such as a county commission or a city council, may require some procedural due process, the circumstances presented in this case do not call for such a ruling.

The enactment of the ordinance was a result of a purely legislative act by the city council of Grand Prairie, an elected body which wields broad power to make a decision in the area of city planning and zoning. The ordinance in question applies generally to all SUPs in existence and those thereafter created. County Line presented no evidence that the city council aimed the ordinance specifically at County Line rather than calling for termination of all SUPs which had suffered non-use for a period of at least six months. Because the city council possesses extensive legislative powers and had enacted an ordinance general in scope, we must apply the legislative model to the ordinance here in question and reject County Line's argument that it has a cognizable claim for relief for violation of procedural due process.

County Line's alternative argument—that the action by the city secretary deprived it of procedural due process—lacks any merit. The city secretary possessed no power to make zoning decisions. Thus, her decision had no effect on the existence or non-existence of the SUP. Indeed, the city secretary's decision could very well have been wrong.

This case has similarities to the circumstances revealed in *Texaco, Inc. v. Short,* 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). In *Texaco,* owners of severed mineral interests appealed the application of an Indiana stat-

ute which automatically extinguished a mineral interest if not used for a period of twenty years.[5] The statute did not provide for notice to the owner of the mineral estate prior to the lapse, but it did provide that the surface owner may give notice to the mineral owner subsequent to the lapse.

The mineral interest owners argued a denial of procedural due process, first because the state failed to notify them of the requirements of the new law, and second because the statute did not require the surface owner to give notice prior to the lapse. The Supreme Court found no merit in either argument.

The Court rejected the argument that the mineral owner should have been given notice of the requirements of the new law even though the owner establishes a property interest. The Court stated that "[i]t is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."[6]

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[5]The Indiana statute, known as the Mineral Lapse Act, Ind. Code §§ 32-5-11-1 to 8 (1976), provides that the owner of the mineral interest who fails to use the interest for a period of twenty years automatically loses the interest, with the interest reverting back to the surface owner. A use of the interest includes the actual or attempted production of minerals, or the paying of taxes or royalties. The owner could also prevent a lapse if the owner files a statement of claim with the local recorder of deeds.

[6]The Court in *Texaco* also stated that "a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." 454 U.S. at 532, 102 S.Ct. at 793. The Court found that the two-year grace period, which allowed a

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Id. at 532, 102 S.Ct. at 793 (citing *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 45 S.Ct. 491, 494, 69 L.Ed. 953 (1925).

After holding that the mineral interest owners were presumed to know the contents of the lapse statute, the Court addressed the issue of whether, given that knowledge, the owners were entitled to a pre-lapse notice from the surface owners. *Id.* 454 U.S., at 533, 102 S.Ct. at 794. The Court, after noting the difference between a self-executing statute and a subsequent judicial determination of a lapse, determined that the mineral interest owner is not entitled to notice of the application of the self-executing statute. In doing so, the Court held that the notice requirements of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), were inapplicable. As the Court in *Texaco* stated:

> The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the

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mineral interest owner to protect an interest which would otherwise lapse upon the effective date of the statute, foreclosed any argument that the mineral interest owners did not have a reasonable opportunity to familiarize themselves with the law. In this case, the City did not provide a grace period. Rather, non-use for a six-month period after the effective date of the ordinance resulted in automatic extinguishment of the SUP. In light of the interest involved in this case, an SUP, compared with the interest involved in *Texaco*, a fee in the mineral interest, we determine that the six-month period in which County Line should have informed itself of the ordinance to be reasonable, particularly because the City gave public notice of its consideration and subsequent adoption of the ordinance. *See id.* (courts should show great deference to legislative judgment regarding adequacy of grace period).

> self-executing feature of the Mineral Lapse Act. The due process standards of *Mullane* apply to an "adjudication" that is "to be accorded finality." The Court in *Mullane* itself distinguished the situation in which a State enacted a general rule of law governing the abandonment of property.

454 U.S. at 535, 102 S.Ct. at 795 (footnote omitted).[7]

County Line may have rights flowing from existing administrative remedies. Before opening for business, County Line must obtain a certificate of occupancy. Grand Prairie, Tex., Ordinances § B-1001. To obtain a certificate, the premises must be properly zoned. *See id.* If the City denies County Line's application for failure to have proper zoning (no SUP), the denial could be appealed to the zoning board of adjustment and appeals. In this way, the zoning board would have the jurisdiction and opportunity to hear the issue of the SUP extinguishment. If County Line obtained no relief from the zoning board, it could appeal the matter in state court. In this way, the decision of the zoning board and that of the courts are "to be accorded finality" and at these stages, we presume County Line will be given an opportunity to be heard. *See Texaco*, 454 U.S. at 535, 102 S.Ct. at 795.

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[7]The Court similarly rejected the owners' argument that they were entitled to specific notice and hearing based on *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (notice and hearing before driver's license suspension); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (notice and hearing before pre-judgment replevin order); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) (notice and hearing before termination of service by public utility). The Court noted that the above cases are different because, in those cases, the interests were "taken only after a specific determination that the deprivation was proper." 454 U.S. at 537, 102 S.Ct. at 796 (footnote omitted).

B. Other Federal Claims

From a review of the pleadings we determine that, in addition to its procedural due process claim, County Line asserts that the ordinance violates County Line's rights to substantive due process and equal protection by being arbitrary and capricious and further that the termination constitutes an improper taking under the fifth and fourteenth amendments. County Line also asserts pendant state law violations. Both parties moved for summary judgment on the issues of procedural due process and state law violations. The district court's opinion did not address the other federal claims asserted by County Line. Thus, the claims are still pending before the district court. We observe that the district court may stay consideration of additional claims pending exhaustion by County Line of its administrative remedies, if any, or the district court may proceed to resolve these remaining matters.

III. CONCLUSION

Accordingly, we affirm the district court's grant of summary judgment for the City on the procedural due process issue. We remand the case for further consideration of the other federal claims and state claims pending any further administrative proceedings initiated by the appellant. AFFIRMED IN PART AND REMANDED.

APPENDIX C

Sections 211.008-211.011
Texas Revised Civil Statutes

(Formerly Art. 1011g)

§ 211.008. Board of Adjustment

(a) The governing body of a municipality may provide for the appointment of a board of adjustment. In the regulations adopted under this subchapter, the governing body may authorize the board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, to make special exceptions to the terms of the zoning ordinance that are consistent with the general purpose and intent of the ordinance and in accordance with any applicable rules contained in the ordinance.

(b) A board of adjustment must consist of five members to be appointed for terms of two years. The appointing authority may remove a board member for cause on a written charge after a public hearing. A vacancy on the board shall be filled for the unexpired term.

(c) The governing body, by charter or ordinance, may provide for the appointment of four alternate board members to serve in the absence of one or more regular members when requested to do so by the mayor or city manager. An alternate member serves for the same period as a regular member and is subject to removal in the same manner as a regular member. A vacancy among the alternate members is filled in the same manner as a vacancy among the regular members.

(d) Each case before the board of adjustment must be heard by at least four members.

(e) The board shall adopt rules in accordance with any ordinance adopted under this subchapter. Meetings of the board are held at the call of the chairman and at other times as determined by the board. The chairman or acting chairman may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public.

(f) The board shall keep minutes of its proceedings that indicate the vote of each member on each question or the fact that a member is absent or fails to vote. The board shall keep records of its examinations and other official actions. The minutes and records shall be filed immediately in the board's office and are public records.

§ 211.009. Authority of Board

(a) The board of adjustment may:

(1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter;

(2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so; and

(3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done.

(b) In exercising its authority under Subsection (a) (1), the board may reverse or affirm, in whole or in part,

or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decision, or determination, and for that purpose the board has the same authority as the administrative official.

(c) The concurring vote of four members of the board is necessary to:

(1) reverse an order, requirement, decision, or determination of an administrative official;

(2) decide in favor of an applicant on a matter on which the board is required to pass under a zoning ordinance; or

(3) authorize a variation from the terms of a zoning ordinance.

§ 211.010. Appeal to Board

(a) Any of the following persons may appeal to the board of adjustment a decision made by an administrative official:

(1) a person aggrieved by the decision; or

(2) any officer, department, board, or bureau of the municipality affected by the decision.

(b) The appellant must file with the board and the official from whom the appeal is taken a notice of appeal specifying the grounds for the appeal. The appeal must be filed within a reasonable time as determined by the rules of the board. On receiving the notice, the official from whom the appeal is taken shall immediately transmit to the board all the papers constituting the record of the action that is appealed.

(c) An appeal stays all proceedings in furtherance of the action that is appealed unless the official from

whom the appeal is taken certifies in writing to the board facts supporting the official's opinion that a stay would cause imminent peril to life or property. In that case, the proceedings may be stayed only by a restraining order granted by the board or a court of record on application, after notice to the official, if due cause is shown.

(d) The board shall set a reasonable time for the appeal hearing and shall give public notice of the hearing and due notice to the parties in interest. A party may appear at the appeal hearing in person or by agent or attorney. The board shall decide the appeal within a reasonable time.

§ 211.011. Judicial Review of Board Decision

(a) Any of the following persons may present to a court of record a verified petition stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality:

(1) a person aggrieved by a decision of the board;

(2) a taxpayer; or

(3) an officer, department, board, or bureau of the municipality.

(b) The petition must be presented within 10 days after the date the decision is filed in the board's office.

(c) On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision. The writ must indicate the time by which the board's return must be made and served on the petitioner's attorney, which must be after 10 days

and may be extended by the court. Granting of the writ does not stay the proceedings on the decision under appeal, but on application and after notice to the board the court may grant a restraining order of due cause is shown.

(d) The board's return must be verified and must concisely state any pertinent and material facts that show the grounds of the decision under appeal. The board is not required to return the original documents on which the board acted but may return certified or sworn copies of the documents or parts of the documents as required by the writ.

(e) If at the hearing the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence as directed. The referee shall report the evidence to the court with the referee's findings of fact and conclusions of law. The referee's report constitutes a part of the proceedings on which the court shall make its decision.

(f) The court may reverse or affirm, in whole or in part, or modify the decision that is appealed. Costs may not be assessed against the board unless the court determines that the board acted with gross negligence, in bad faith, or with malice in making its decision.

APPENDIX D

Section D-100 of Grand Prairie Zoning Ordinance

SECTION D-100 BOARD OF ADJUSTMENTS AND APPEALS

D-101 *Organization.* There is hereby created a Board of Adjustment consisting of five (5) members, each to be appointed by resolution of the City Council for a term of two years and removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member, whose place becomes vacant for any cause, in the same manner as the original appointment was made. Two members heretofore appointed shall serve until June 1, 1972, or until their successors are appointed and three members, as heretofore appointed, shall serve until June 1, 1973, or until their successors are appointed, and thereafter each member reappointed or each new appointee shall serve for a full term of two years unless removed as hereinabove provided. Provided, however, that the City Council may appoint four alternate members of the Board of Adjustment who shall serve in the absence of one or more of the regular members when requested to do so by the Mayor or City Manager, as the case may be, so that all cases to be heard by the Board of Adjustment will always be heard by a minimum number of the four members. The alternate members, when appointed, shall serve for the same period as the regular members, which is for a term of two years, and any vacancy shall be filled in the same manner and they shall be subject to removal the same as the regular members.

D-102 The Board shall adopt rules to govern its proceedings provided, however, that such rules are not inconsistent with this Ordinance of statutes of the

State of Texas. Meetings of the Board shall be held at the call of the Chairman and at such other times as the Board may determine. The Chairman, or in his absence, the Acting Chairman, may administer oath and compel the attendance of witnesses. All meetings of the Board shall be open to the public. The Board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicate such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Board and shall be a public record.

D-103 Appeals to the Board of Adjustment can be taken by any person aggrieved or by an office, department or board of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within fifteen (15) days time after the decision has been rendered by the administrative officer, by filing with the officer from whom the appeal is taken and with the Board of Adjustment, a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from was taken.

D-107 ACTION OF THE BOARD

1. In exercising its powers, the Board may, in conformity with the provisions of Articles 1011-a and including 1011-j of the 1925 Civil Statutes of Texas as amended, revise or reform, wholly or partly, or may modify the order, requirement, decisions, or determination appealed from and make such order, requirement, decisions, or determination appealed from and make such order, requirement, decision or determination as ought be made and shall have all the powers of the officer from whom the appeal is taken including the

power to impose reasonable conditions to be complied with by the applicant.

2. The concurring vote of four (4) members of the Board shall be necessary to revise any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under this Ordinance or to affect any variance in said Ordinance.

3. Any person or persons, jointly or severally, aggrieved by any decision of the Board of Adjustment or any taxpayer or any officer, department or board of the municipality may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or part, specifying the grounds of the illegality. Such petition shall be presented to the court within ten (10) days after the filing of the decision in the office of the Board and not thereafter.

APPENDIX E

ORDINANCE No. 2750

AN ORDINANCE AMENDING THE ZONING MAP AND ORDINANCE SHOWING THE LOCATION, BOUNDARY AND USE OF CERTAIN PROPERTY BY THE GRANTING OF A SPECIFIC USE PERMIT FOR ON-SITE USE OF ALCOHOLIC BEVERAGES AT 2515-H WEST JEFFERSON, TO WIT: TRACT 6-1 OUT OF THE TAPLEY HOLLAND SURVEY, ABSTRACT 750 TARRANT COUNTY, TEXAS; SAID ZONING MAP AND ORDINANCE PASSED ON JANUARY 27, 1971, AND RECORDED IN BOOK 8, PAGES 405 TO 509 OF THE ORDINANCE RECORDS OF THE CITY OF GRAND PRAIRIE, TEXAS; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH; CONTAINING A SAVINGS CLAUSE; AND TO BECOME EFFECTIVE UPON ITS PASSAGE AND APPROVAL.

WHEREAS, the owners of the property described hereinbelow filed application with the City of Grand Prairie, Texas, petitioning an Amendment of the Zoning Ordinance and Map of said City so as to obtain a specific use permit to allow on-site use of alcoholic beverages at 2515-H West Jefferson on said property which is presently zoned Commercial Office; and

WHEREAS, the Planning and Zoning Commission of Grand Prairie, Texas, held a public hearing on said application on August 23, 1976 after written notice of such public hearing before the Planning and Zoning Commission on the proposed specific use permit for on-site use of alcoholic beverages at 2515-H West Jefferson had been sent to

owners of real property lying within 200 feet of the property on which the specific use permit for on-site use of alcoholic beverages at 2515-H West Jefferson is proposed, said Notice having been given not less than ten (10) days before the date set for hearing to all such owners who rendered their said property for City taxes as the ownership appears on the last approved City Tax Roll, and such Notice being served by depositing the same, properly addressed and ostage paid, in the City Post Office; and

WHEREAS, after consideration of said application, the Planning and Zoning Commission of the City of Grand Prairie, Texas voted unanimously to recommend to the City Council of Grand Prairie, Texas, that a specific use permit be granted to allow on-site use of alcoholic beverages at 2515-H West Jefferson on said property; and

WHEREAS, Notice was given of a further public hearing to be held by the City Council of the City of Grand Prairie, Texas, in the City Hall Plaza Building at 7:30 o'clock P.M. on August 31, 1976, to consider the advisability of amending the Zoning Ordinance and Map as recommended by the Planning and Zoning Commission, and all citizens and parties at interest were notified that they would have an opportunity to be heard, such Notice of the time and place of such hearing having been given at least fifteen (15) days prior to such hearing by publication in the Grand Prairie Daily News, Grand Prairie, Texas, a newspaper of general circulation in such municipality; and

WHEREAS, all citizens and parties at interest have been given an opportunity to be heard on all the matter of the proposed specific use permit and the City Council of the City of Grand Prairie, Texas, being informed as to the location and nature of the specific use proposed on said

property, as well as the nature and usability of surrounding property, have found and determined that the property in question, as well as other property within the city limits of the City of Grand Prairie, Texas, has changed in character since the enactment of the original Zoning Ordinance to the extent that a specific use may be made of said property as herein provided and by reason of changed conditions, does consider and find that this amendatory Ordinance should be enacted since its provisions are in the public interest and will promote the health, safety and welfare of the community.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

I.

That the Zoning Ordinance and Map of the City of Grand Prairie, Texas, showing the locations and boundaries of certain districts, and said Zoning Ordinance and Map having been made a part of an Ordinance entitled:

> "AN ORDINANCE AMENDING IN ITS ENTIRETY CHAPTER 36 OF THE CODE OF ORDINANCES KNOWN AS THE ZONING ORDINANCE OF THE CITY OF GRAND PRAIRIE, TEXAS, AS PASSED AND APPROVED BY THE CITY COUNCIL ON THE 27TH DAY OF JANUARY, 1971. TOGETHER WITH ALL AMENDMENTS THERETO AND ENACTING A REVISED ORDINANCE ESTABLISHING AND PROVIDING FOR ZONING REGULATIONS: CREATING USE DISTRICTS IN ACCORDANCE WITH A COMPREHENSIVE PLAN . . . ."

and passed and approved January 27, 1971, recorded in Ordinance Book B, Page 405 to 509, inclusive, as amended,

is hereby further amended so as to establish a specific use permit numbered 212 for the purpose of on-site use of alcoholic beverages at 2515-H West Jefferson on the following described area:

Tract 6-I out of the Tapley Holland Survey, Abstract 750 Tarrant County, Texas.

II.

That the following terms and conditions are hereby imposed as a part of this ordinance:

NONE

III.

It is further provided that in case a section, clause, sentence or part of this Ordinance shall be deemed or adjudged by a Court of competent jurisdiction to be invalid, then such invalidity shall not affect, impair or invalidate the remainder of this Ordinance.

IV.

All ordinances or parts of ordinances in conflict herewith are specifically repealed.

V.

That this Ordinance shall be in full force and effect from and after its passage and approval.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this the 31st day of August, 1976.

/s/ WELDON PARKHILL
Mayor,
City of Grand Prairie, Texas

ATTEST:

/s/ MELBA FLAGG
City Secretary

APPROVED AS TO FORM AND
LEGALITY:

/s/ R. CLAYTON HUTCHINS
P&Z Case No. 760203

APPENDIX F

ORDINANCE No. 3745

AN ORDINANCE AMENDING ORDINANCE NO. 2299, BEING THE COMPREHENSIVE ZONING ORDINANCE OF THE CITY OF GRAND PRAIRIE, TEXAS, BY ADDING THERETO A NEW SECTION B-713 PROVIDING FOR AUTOMATIC TERMINATION OF SPECIFIC USE PERMITS; CONTAINING A SAVINGS CLAUSE; REPEALING ALL ORDINANCES IN CONFLICT HEREWITH; AND TO BECOME EFFECTIVE UPON PASSAGE, APPROVAL AND PUBLICATION.

WHEREAS, the Planning and Zoning Commission of the City of Grand Prairie, Texas, met in regular session on the 11th day of February, 1985, after publication in the Grand Prairie Daily News on the 1st day of February, 1985; and

WHEREAS, after consideration and public hearing the Planning and Zoning Commission recommended to the City Council of the City of Grand Prairie, Texas, that Ordinance No. 2299, same being the comprehensive zoning ordinance of the City, be amended to provide for automatic termination of specific use permits.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

SECTION 1: THAT Ordinance No. 2299, same being the Comprehensive Zoning Ordinance of the City of Grand Prairie, Texas, is hereby amended by adding thereto a new Section B-713 related to termination of specific use permits, which section shall read in its entirety as follows:

"B-713. Termination of Specific Use Permits.

A. All specific use permits approved in accordance with the provisions of this ordinance in its original form or as hereafter amended shall automatically terminate upon cessation of the use for a period of six months, regardless of the intention of the owner.

B. Any specific use permit granted by the City Council shall automatically terminate if a building permit has not been obtained on the premises within one year from the date the ordinance granting the specific use permit is adopted.

C. On any tract of land for which a specific use permit has been granted and the use has ceased as of the date of this ordinance, such specific use permit shall automatically terminate six months after the adoption of this ordinance unless the use has been reinstated by that time.

D. Specific use permits in existence as of the date of this ordinance shall automatically terminate one year from the date of this ordinance if a building permit has not been obtained by that time."

SECTION 2: If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

SECTION 3: All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.

SECTION 4: THAT this ordinance shall be in full force and effect from and after its passage, approval and publication.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this the 19th day of February, 1985.

/s/ J. V. DEBO III
Mayor, City of
Grand Prairie, Texas

ATTEST:

/s/ SUE SHAWVER
City Secretary

APPENDIX G

Affidavit of City Attorney Concerning Jurisdiction of Zoning Board of Adjustment

AFFIDAVIT

STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared *R. Clayton Hutchins*, who, being by me sworn, deposes as follows:

My name is *R. Clayton Hutchins*. I am over 21 years of age, of sound mind, capable of making this affidavit, and am fully competent to testify to the matters stated herein.

I am presently employed by the City of Grand Prairie, Texas, in the capacity of City Attorney.

Shortly after December 2, 1985, but before December 17, 1985, I was contacted by Jane Allen, an attorney with Haynes and Boone in Dallas, who represented County Line Joint Venture. Her call related to the denial of the alcoholic beverage, amusement device and dance hall permits for the property located at 2515-H Jefferson by Sue Shawver, City Secretary, on the 2nd day of December, 1985. The permit was denied because the property was not zoned for the sale of alcoholic beverage, dance hall or amusement devices. The specific use permit zoning had expired due to non use for a period greater than six (6) months as provided in § B-713 of the Zoning Ordinance of the City. In the conversation I told Ms. Allen that if she wished to

present evidence or proof that the establishment had in fact been open and operated for the sale of alcoholic beverages during the six months prior to the denial of the alcoholic beverage permit, the City could consider that evidence. None was ever presented.

On December 17, 1985, Joseph G. Warner and Jane G. Allen submitted an application to appeal denial of the alcoholic beverage permit to the Zoning Board of Adjustments and Appeals. In the alternative applicant asked for a variance to the zoning ordinance. I indicated by handwritten notation dated January 7, 1986 that the Zoning Board of Adjustments had no jurisdiction of the case.

The Board had no jurisdiction for the following reasons:

1. The denial of an alcoholic beverage permit or license per se is not a zoning matter. Pursuant to V.A.C.S. Art. 1011f, the Zoning Board of Adjustments and Appeals only has jurisdiction over zoning matters.

2. Since the regulations related to alcoholic beverage permits are not contained in the zoning ordinance of the City, the Board could not grant a variance since its only authority to grant variances relates to those matters contained in the zoning ordinance.

3. The applicant had never applied for a certificate of occupancy and compliance the denial of which would

trigger jurisdiction of the Zoning Board of Adjustments and Appeals.

/s/ R. Clayton Hutchins
R. Clayton Hutchins
City Attorney
City of Grand Prairie, Texas

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority on this 14th day of Nov., A.D., 1986.

/s/ Rosemary Bawlby
Notary Public in and for
Dallas County, Texas
My Commission Expires 7-13-89.